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Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In the
# Supreme Court of the United States

DAVID M. CLAPPER,
*Petitioner*,

v.

TACCO FALCON POINT, INC.,
*Respondent*.

*On Petition for Writ of Certiorari to the Michigan Court of Appeals*

# PETITION FOR WRIT OF CERTIORARI

ANDREW W. MYCHALOWYCH
*Counsel of Record*
LINDSAY JAMES
SICILIANO MYCHALOWYCH
VAN DUSEN AND FEUL, PLC
37000 GRAND RIVER AVENUE
SUITE 350
FARMINGTON HILLS, MI 48335
(248) 442-0510

*Counsel for Petitioner*

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## QUESTION PRESENTED

Respondent filed a complaint against Petitioner in Michigan state court to domesticate an Indiana judgment, entered by an Indiana state court in favor of Respondent's assignor against Petitioner.

In Michigan, Petitioner argued that the judgment should be neither domesticated nor enforced, because, under Indiana law, the judgment had been satisfied based on events subsequent to the entry of the Indiana judgment. Respondent did not dispute the effect of the application of *Indiana* substantive law, but argued that under *Michigan* substantive law, the judgment would not be satisfied.

The Michigan trial court and the Michigan Court of Appeals believed they were required by federal law and this Court's precedent to apply Michigan substantive law to Petitioner's arguments and defenses to the judgment; and interpreted Michigan law in a way that would render the judgment not satisfied. The Michigan courts therefore ruled that the Indiana judgment may be domesticated and enforced in Michigan, even though the state of rendition (Indiana) would deem the judgment satisfied.

1. Applying Article IV, Section 1 of the U.S. Constitution (the "full faith and credit clause") and 28 USC § 1738 (the full faith and credit statute), if Indiana law is such that the judgment would be satisfied, is Michigan giving full faith **and credit** by domesticating the judgment **and allowing** Respondent to enforce the judgment?

## LIST OF PARTIES

The Petitioner is David M. Clapper, a Defendant/Counter-Plaintiff/Third-Party Plaintiff in a civil action in the Oakland County Circuit Court (Case No. 02-042917-CZ); the Appellant in the Michigan Court of Appeals (Case No. 271525); and the Appellant in the Michigan Supreme Court (Case No. 133430).

The Respondent is TacCo Falcon Point, Inc., a Plaintiff/Counter-Defendant in the Oakland County Circuit Court; the Appellee in the Michigan Court of Appeals; and the Appellee in the Michigan Supreme Court.

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review: (i) a June 1, 2006 Order of the Oakland County Circuit Court (State of Michigan); and (ii) a February 1, 2007 2-1 decision of the Michigan Court of Appeals.

## OPINIONS BELOW

The Order of the Oakland County Circuit Court (Case Number 02-42917-CZ) is not a reported decision. It is reproduced in **Appendix B**.

The Michigan Court of Appeals Per Curiam Opinion (Case Number 271525) and the Dissenting Opinion are not reported decisions. They are in **Appendix A** (*see also* 2007 WL 287173, *app. to Mich. Sup. Ct. denied*, 481 Mich. 886; 749 N.W.2d 254 (2008), *reconsideration pending*.

The Michigan Supreme Court Opinion is reported at 461 Mich. 886; 749 N.W.2d 254 (2008). It is in **Appendix C**.

## JURISDICTION

Petitioner's application to Michigan's highest court (the Michigan Supreme Court, where all review is discretionary) to review the Michigan Court of Appeals February 1, 2007 Opinion was denied on June 4, 2008.

The jurisdiction of this Court is sought to be invoked pursuant to 28 USC § 1257(a). The petition is timely pursuant to 28 USC § 2101(c).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section one of Article IV of the United States Constitution reads, in part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 USC § 1738 provides:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

## STATEMENT OF THE CASE

On February 19, 2002, Inland Mortgage Corporation ("Inland") secured a judgment (the "Judgment") in Indiana state court against Petitioner David M. Clapper ("Clapper") and other Defendants, including American Realty Trust, Inc. ("ART"). On March 15, 2002, Inland assigned the Judgment to Respondent TacCo Falcon Point, Inc. ("TacCo).

On August 7, 2002, TacCo filed a complaint against Clapper in Michigan state court to domesticate and ultimately enforce the Judgment in Michigan.

TacCo filed for bankruptcy in a Texas federal bankruptcy court. After the bankruptcy case was dismissed, both TacCo and Clapper filed cross-motions for summary disposition (the equivalent to the federal summary judgment). Clapper argued that under Indiana law the Judgment was satisfied based on facts subsequent to the Judgment's entry. TacCo argued that under Michigan law the Judgment was not satisfied.

The Michigan trial court agreed with TacCo, that: (a) Michigan law, not Indiana law, should apply; and (b) under Michigan law, the Judgment had not been satisfied (although the court agreed that under Indiana law, the Judgment would be deemed satisfied). In making this decision, the trial court relied on the U.S. Constitution's full faith and credit clause (Article IV) and this Court's decision in *Baker by Thomas v. General Motors, Corp*, 522 U.S. 222 (1998), with the trial court believing that it was bound to apply substantive forum law in a case involving the domestication of a judgment. By way of a June 1, 2006 Order (**App. B**), the trial court granted TacCo's motion and denied Clapper's motion.

On July 5, 2006, Clapper timely appealed by right to the Michigan Court of Appeals. Citing *Baker*, the Court of Appeals, in a February 1, 2007 2-1 decision (**App. A**), affirmed.

On March 15, 2007, Clapper timely filed an application for leave to the Michigan Supreme Court. The Michigan Supreme Court's decision to take a case is discretionary. In a June 4, 2008 6-1 decision, the Michigan Supreme Court declined to hear the appeal (**App. C**), with the majority finding, as it often does in declining review, that it was "not persuaded that the questions presented should be reviewed by this Court." Justice Michael F. Cavanagh dissented, stating that he would remand the case to the trial court for the reasons set forth in Court of Appeals Judge Peter D. O'Connell's February 1, 2007 dissenting opinion.

On June 20, 2008, Clapper timely sought reconsideration of the Michigan Supreme Court's denial of leave. The motion is pending.

Clapper has now timely petitioned this Court for a writ of certiorari to the Michigan Court of Appeals.

## STATEMENT OF THE FACTS

In 1996, Atlantic Limited Partnership XII borrowed $2.2 million from Inland.[1] The funds were to be used to fund the purchase of an apartment project located in Indianapolis, Indiana known as Country Squire Apartments ("Country Squire").[2] The loan was secured

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[1] *See* Petitioner's May 8, 2006 Brief in Support of Motion for Summary Disposition against ART Midwest, LP ("**PBISSD ARTM**"), p. 2 (Oak. Ct. Cir. Ct.).

[2] *See id.*

by a mortgage on Country Squire and a note.[3] Clapper and Third-Party Defendant ART guaranteed payment of the note.[4]

When the loan went into default, Inland sued Clapper and ART (and others) in Indiana state court for payment of the deficiency.[5] On February 19, 2002, the Indiana court entered a $3.2 million Judgment in favor of Inland against Clapper and ART (and others).[6] The Judgment additionally required Country Squire to first be sold at a sheriff's sale, with the proceeds to Inland to pay the Judgment.[7]

In late February and early March, ART secretly entered into negotiations with Inland to "purchase" the Judgment.[8] A Settlement Agreement was reached where Inland agreed to assign the Judgment to an entity ART designated as "Purchaser" in exchange for the following consideration:

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[3] *See id.*

[4] *See id.* at p. 3.

[5] *See id.* at p. 4.

[6] *See id.* *See also* Petitioner's May 8, 2008 Brief in Support of Petitioner's Motion for Summary Disposition against TacCo ("**PBISSD TAC**"), p. 2.

[7] *See* Petitioner's August 28, 2006 Brief on Appeal ("**PBOA**"), Ex. 2, pp. 8-9 (Mich. Ct. App.). *See also* **PBISSD TAC** at p. 2 & Ex. B, pp. 8-9 (2/19/02 Order of the Marion County Circuit Court).

[8] *See* **PBISSD TAC** at pp.3-4.

(i) $1.5 million in cash;
(ii) A $1.5 million note, guarantied by ART's parent, American Realty Investors (into which ART has merged);
(iii) An agreement by the eventual Purchaser not to sell Country Squire at foreclosure for less than $1,000,000.00;
(iv) A $250,000.00 letter of credit in favor of Inland; and
(v) Inland's retention of a security interest in the Judgment through a conditional assignment.[9]

On March 1, 2002, ART paid Inland $100,000.00 to extend the closing deadline two weeks.[10] Also on March 1, 2002, ART caused papers to be filed with the State of Nevada, creating and incorporating TacCo.[11] TacCo was created for the sole purpose of becoming "Purchaser" of the Judgment.[12] The record below demonstrates that ART controls TacCo.[13]

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[9] *See* **PBISSD TAC** at pp.3-4 & Ex. C (Settlement Agreement).

[10] *See* **PBISSD TAC** at p. 7 & Ex. K (wire transfer form).

[11] *See* **PBISSD TAC** at p. 3 & Ex. D (incorporation papers).

[12] *See* **PBISSD TAC** at p. 3 & Ex. E, p. 32 (Dep. Tr. Wayne Starr).

[13] *See* **PBISSD TAC** at pp. 4-20 & Exs. C-T, V; Petitioner's May 17, 2006 Brief in Opposition to Respondent's Motion for Summary Disposition against TacCo ("**PBIOSD TAC**"), pp. 2, 5-9 & Exs. A-K (Oak. Ct. Cir. Ct.); **PBOA**, pp. 3-20, 25-30.

In accordance with the Settlement Agreement, on or about March 13, 2002, ART wired Inland nearly $1.5 million cash; TacCo executed the $1.5 million note; ART wired $250,000.00 to TacCo for the letter of credit; Gene Phillips, whose family controls ART, guaranteed payment on the letter of credit; and TacCo entered into the aforementioned foreclosure agreement.[14] On March 15, 2002, pursuant to an agreement negotiated and drafted by ART (not TacCo), Inland assigned the Judgment to TacCo.[15]

In exercising rights under the conditional assignment, Inland was limited to collection of no more than $1.5 million.[16] In other words, Inland gave ART credit against the Judgment for the $1.5 million cash payment. TacCo thereafter made the agreed minimum $1 million credit bid at an auction.[17] As such, when including the May 1, 2002 $100,000 wire transfer, the Judgment should have been worth no more that $600,000 ($3.2m - $1.5m - $100,000 - $1.0m).[18]

In 2002, TacCo filed a complaint against Clapper in Michigan's Oakland County Circuit Court ("Trial Court"), seeking to domesticate and enforce the

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[14] *See* **PBIOSD TAC**, Ex. A; **PBOA**, Exs. 11, 16, 25.

[15] *See* **PBISSD TAC**, p. 3; **PBOA**, p. 4.

[16] *See* **PBISSD TAC**, Ex. C, ¶ 3(b).

[17] **PBOA**, pp. 3-4.

[18] *See* **PBISSD TAC**, pp. 19-20.

Judgment.[19] TacCo argued that it held a $3.2 million Judgment, less the $1 million foreclosure, and sought a $2.2 million judgment against Clapper. Clapper defended by arguing (among other arguments) that the Judgment was satisfied because a co-Judgment debtor, ART, paid the Judgment, either directly or through ART's strawman/instrumentality/alter ego --- TacCo.[20]

TacCo filed a motion for summary disposition (Michigan's equivalent to the federal summary judgment), arguing that Clapper's defenses, while dispositive in Indiana, were not available in Michigan. Clapper filed his own motion for summary disposition pursuant to Michigan Court Rules 2.116(C)(10), 2.612

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[19] Naturally, TacCo never sought to collect on the Judgment from ART, its alter ego.

[20] *See* **PBIOSD TAC**, pp. 2-3, 5; **PBOA**, pp. 3-15 (Mich. Ct. App.); **PBISSD TAC**, pp. generally 1-20, Ex. A; Petitioner's May 22, 2006 Reply Brief in Support of Motion for Summary Disposition against TacCo ("**PRBISSD TAC**"). Clapper made these same arguments in Indiana state court. However, when Clapper made the arguments and the trial judge ordered expedited discovery on the satisfaction arguments, ART caused TacCo, nary two months old, to file for bankruptcy in a federal court in Texas Case. Case Nos. 02-42876-S; 02-04271 (Bankr. E.D. Tx.)(Hon. Donald R. Sharp). **PBIOSD TAC**, pp. 4-5; **PBOA**, p. 1.

(C)(1)(e), MCR 2.620(3),[21] based in part on the arguments set forth above.[22]

Clapper asked the Trial Court to apply Indiana substantive law to his arguments.[23] In Indiana, when a co-judgment debtor uses a strawman to "purchase" the judgment, the judgment is deemed satisfied; i.e., he can't buy the judgment (through himself or through a straw entity); he only pays the judgment.[24] By way of information, Black's Law defines a strawman as follows:

> Straw man or party. A "front"; a person who is put up in name only to take part in a deal. Nominal party to a transaction; one who acts as an agent for another for the purpose of taking title to real property and executing whatever documents and instruments the principal may direct respecting the property. Person who

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[21] "[MCR 2.620] provides for a hearing procedure to permit the court to determine if the judgment has been satisfied." *Oakwood Hospital v. Tobin*, 6 Mich. App. 566, 570; 149 N.W.2d 890 (1967) (emphasis omitted). "The court shall hear proofs to determine whether the order should be entered." MICH. CT. R. 2.620 (3).

[22] **PBISSD TAC**, pp. 8-17; **PBOA**, p. 22.

[23] *See supra* nn. 20-22.

[24] *See id.* and *see* PBOA, pp. 8-9, and *see also, e.g., Klippel v. Shields*, 90 Ind. 81, 82-83 (1883); *Hubble v. Berry*, 180 Ind. 513, 521; 103 N.E. 328 (1913); *Zimmerman v. Gaumer*, 152 Ind. 552, 560-61; 53 N.E. 829 (1899); *Lapworth v. Jones*, 133 Ind. App. 388, 392-93; 182 N.E.2d 453 (1962); *Lillie v. Dennert*, 232 F. 104, 108-09 (6th Cir. 1916).

> purchases property for another to conceal identity of real purchaser.[25]

Clapper argued and supported below with evidence that TacCo was, in fact, ART's strawman.[26]

The Trial Court appeared to concede that if Indiana law applied, the judgment would be deemed satisfied.[27] However, in addressing Clapper's argument (e.g., that, in determining the continuing validity of a judgment, a domesticating state should apply the law of the rendition state in accord with the venerable authority of *Hampton v. M'Connel*, 16 U.S. 234, 235 (1818)),[28] the Trial Court ruled that "Enforcement measures do not travel with the sister state judgment as preclusive effects do," citing this Court's decision in *Baker by Thomas v. GMC*, 522 U.S. 222, and "the strawman defense is not available to Defendant as it is not

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[25] BLACK'S LAW DICT. (5th ed. 1979) p. 1274, col. 1. *See also Hoosier v. Lander*, 14 Cal. App. 4th 234, 238 & n.4 (Ct. App. Cal. 1993)

[26] **PBISSD TAC**, pp. 3-17 (and exhibits); **PBIOSD TAC**, 1-19 (and exhibits); **PBOA**, pp. 3-15 (and exhibits). **PRBISSD TAC**, pp. 1-5.

[27] May 31, 2006 Transcript of Hearing of Oakland County Circuit Court, p. 18 ("However, the next question is whether the strawman defense can be raised in Michigan where it is not recognized here but is available in Indiana."). *See also* **PBOA**, Ex. 13.

[28] **PBIOSD TAC**, pp. 2-3; **PBOA**, pp. 10-11.

recognized in the state of Michigan."[29] The Trial Court therefore entered judgment in favor of TacCo.[30]

The Michigan Court of Appeals, in a 2-1 decision, affirmed the Trial Court's disposition:

> [I]n *Baker v General Motors, Corp*, 522 US 222, 235; 118 S Ct 657; 139 L Ed 2d 580 (1998), the U.S. Supreme Court held that "[f]ull faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law."[31]

Citing to Michigan law and other authority, the Court of Appeals held:

> Under the above authorities, the circuit court correctly concluded that Michigan law, not Indiana law, controls with regard to the present action. . . . These various issues [Clapper's strawman arguments], dealing with the

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[29] *See supra* n. 26 at p. 19.

[30] **App. B**, 22a-24a.

[31] **App. A**, 6a.

> enforcement of the judgment, are governed by Michigan law. *Baker*, *supra* at 235.[32]

One point of agreement was that domesticating states may apply their court and statutory procedures to the mechanism of enforcement of a judgment. But as dissenting Court of Appeals Judge Peter D. O'Connell recognized, if a judgment is satisfied, there is nothing to enforce. And therefore, there needed to be a preliminary inquiry into whether the Judgment had been, in fact, satisfied.[33] Clapper agreed and argued such a preliminary inquiry had nothing to do with procedure, sheriffs, writs of garnishment, liens, or the like. Those issues only become relevant if a judgment were properly domesticated. The inquiry Clapper wanted and Judge O'Connell voted for was about which state's substantive law should govern the inquiry of whether the Judgment was satisfied. Clapper argued that the law of the state rendering the Judgment should apply: Indiana.

The Michigan courts, however, applied Michigan law. It is not that Michigan's courts believed that a substantive Michigan policy was materially implicated or that there was something about Indiana law that was offensive. The Michigan courts' beliefs were grounded in their interpretations of the U.S. Constitution, federal law, and their beliefs that this

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[32] **App. A**, 6a-8a ("We apply Michigan law to these enforcement proceedings," *citing* Baker, 522 U.S. at 235).

[33] **App. A**, 19a-21a & n.1.

Court's decisions compelled the application of Michigan law.[34]

## SUMMARY OF THE ARGUMENT

Clapper seeks a writ of certiorari to the Michigan Court of Appeals and requests that this Court hold that the full faith and credit clause (Article IV of the U.S. Constitution) and the full faith and credit statute (28 USC § 1738) require or at least permit states domesticating judgments to apply the substantive law of the state of rendition to defenses to the judgment.

This is *not*, contrary to the Michigan Court of Appeals' Opinion, a collateral attack on the merits of the Judgment. Clapper's arguments are grounded in post-judgment facts that would deem the judgment satisfied, primarily that the Judgment has been paid. Which state's law applies in determining whether or not there has been payment is the whole ballgame. Clapper argues that in these circumstances Indiana law should be applied, based on this Court's precedent and the purposes underlying full faith and credit.[35]

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[34] *See supra* nn. 27, 29-33.

[35] Consider another argument in a similar vein. If Inland came to Michigan tomorrow to domesticate and enforce the Judgment, Clapper would argue that the Judgment should not be domesticated or enforced because Inland no longer holds the Judgment. If, however, there were some disagreement as to whether there had been, in fact, an assignment, that analysis should be judged by Indiana law, not Michigan law.

The parties and the courts of Michigan in this case appear to agree that if Petitioner's arguments were judged by Indiana law, the state of rendition, the judgment would be satisfied. Michigan's courts, however, held that under this Court's precedents in *Hampton v. M'Connel*, 16 U.S. 234, 235 (1818) and *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 235 (1998), that Michigan was required to apply substantive forum law when the continued viability of a judgment is challenged. Michigan's courts ultimately interpreted Michigan law in a way that would render the judgment unsatisfied and therefore enforceable.

The issue for these parties is critical. Depending on which state's law applies, either a $2.2 million judgment is satisfied or it is not. The State of Michigan looked to the U.S. Constitution, federal statute, and this Court's precedents to make that decision. Therefore, a federal question is presented.

This case gives this Court a perfectly postured opportunity to define the contours of what full faith and credit means when the rendition state's law says one thing and the domesticating state says another. Consideration of the issues in this case has the potential to impact the effect of every judgment rendered in the state courts of the United States. Moreover, the proper interpretation of the full faith and credit clause is one of the most important threads binding an otherwise polite fraternity of sovereign states into an indestructible union of United States. It goes to the essence of what it means to be a Union, because the states' reciprocal dignity owed to each

other has its guts in Article IV. It is, respectfully, worthy of this Honorable Court's analysis.

## ARGUMENT

This Court has defined the purpose of Article IV's full faith and credit clause as follows:

> [T]o alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.[36]

Congress codified Article IV's mandate in 28 USC § 1738.[37] Since federal law determines the measure of faith and credit one state must give another state's judgment,[38] federal questions were presented and decided in Michigan's courts which Clapper requests that this Court review.

This Court's precedent suggests that the full faith and credit clause requires the forum state to apply the

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[36] *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935).

[37] *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 270 (1980).

[38] *See id.* at 272 & n. 15.

law of the rendition state when interpreting the validity and continued viability of a judgment:

> [T]he judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced, and that **whatever pleas would be good to a suit thereon in such state, and none others, could be pleaed in any other court in the United States. . . . That in every case arising under the act, the only inquiry is, what is the effect of the judgment in the state where it was rendered.**[39]

State courts have held similarly. For example, courts in West Virginia, Texas, and North Carolina have held that "In order to ensure that another state's judgment is given the same force and effect it would have in that state, the general rule appears to be that [t]he validity and effect of a judgment must be determined by reference to the laws of the state where

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[39] *Hampton v. M'Connel*, 16 U.S. 234, 235 (1818) (emphasis added), *citing Mills v. Duryee*, 7 Cranch 481, 484 (1813). *See also Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health*, 455 U.S. 691, 704 (1982) ("This Court has consistently recognized that, in order to fulfill this constitutional mandate, the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.") (quotes and citation omitted).

it was rendered."[40] To that end, Justice Kennedy has written:

> The beginning point of full faith and credit analysis requires a determination of the effect the judgment has in the courts of the issuing State. In our most recent full faith and credit cases, we have said that determining the force and effect of a judgment should be the first step in our analysis.[41]

Indiana law should have been applied in Michigan's courts. And since the Judgment would no longer have force in Indiana,[42] it should not have been domesticated or enforced in Michigan. "The full faith and credit clause does not . . . protect a judgment . . . [that] has been paid."[43]

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[40] *Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W.Va. 465, 474; 513 S.E.2d 692 (1998) (internal quotes omitted), *citing* 50 C.J.S. § 969, p. 563. *See also Bard v. Charles R. Myers Ins. Agency, Inc.*, 839 S.W.2d 791, 795 (Tex. 1992) ("The validity of the judgment is determined by the laws of the state where it was rendered."); *Freeman v. Pacific Life Ins. Co.*, 156 N.C.App. 583, 587; 577 S.E.2d 184 (2003) ("The law of the rendering court is reviewed to determine whether the judgment is valid.").

[41] *Baker*, 522 U.S. at 247 (Kennedy, J., concurring).

[42] *See supra* n. 24.

[43] *Trauger v. A.J. Spagnol Lumber Co., Inc.*, 442 So.2d 182, 183 (Fla. 1983), *relying on Milwaukee County*, 296 U.S at 275.

Under this Court's more modern precedent, the law the domesticating state applies appears to be at least discretionary: "[U]nder the Full Faith and Credit Clause . . . a court can lawfully apply either the law of one State or the contrary law of another."[44] It certainly does not *require* the domesticating state to apply its own law.

The Second Restatement of Conflict of Laws publishes the academy's position that while the domestication state determines the *procedure* for consideration of defenses to the judgment, the state of rendition supplies the *law* to test those defenses:

> [T]he local law of the state of rendition will be applied to determine whether equitable relief can be obtained against the judgment. On the other hand, the local law of the state where recognition of enforcement of the judgment is sought determined the procedure for obtaining such relief.[45]

In particular, comment b to § 116 states:

> A judgment creditor will not be permitted to obtain greater relief than that to which he is entitled under the local law of the state where the judgment was rendered.[46]

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[44] *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988).

[45] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 115. **PBOA**, pp. 20-22.

[46] **PBOA**, pp. 20-22.

Michigan's courts allowed just that, giving TacCo greater relief in Michigan than that to which TacCo would be entitled in Indiana. The first illustration in § 116 shows, by analogy, what should have occurred in this case:

> In state X, A obtains a judgment for $1,000 against B in compensation for personal injuries suffered in an automobile accident by reason of B's negligence. Under X local law, the judgment is thereupon discharged . . . . [and] [t]he judgment is no longer subject to enforcement in other states.

The Michigan courts construed this Court's decision in *Baker by Thomas v. GMC* as requiring domesticating states to apply *forum* law, both procedural *and* substantive, to defenses to the judgment, relying on this language:

> Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.

Clapper respectfully believes that this statement means only that once a judgment is domesticated, the *enforcement* of the judgment is subject to local law. For example, if the Judgment were properly domesticated, TacCo would be required to follow Michigan law in terms of obtaining writs of

garnishment for a Michigan bank account owned by Clapper (following Michigan court and statutory procedure, using Michigan garnishment forms, referring to Michigan statute as to whether a given account may legally be garnished, etc.); or judgment liens against Michigan property owned by Clapper (using court and Michigan statutory procedure for execution, using approved Michigan judgment lien forms, complying with Michigan sheriff sale procedures, etc.). This is because requiring a Michigan sheriff to understand the vagaries of Indiana foreclosure law when the sheriff is foreclosing on a piece of Michigan property would impose an undue burden on the domesticating state, and one not necessary to achieve the goals of full faith and credit.

Here, however, the only "burden" is requiring state judges to answer the *preliminary* question as to whether the judgment has been satisfied. And if this requires state judges to apply the law of rendition states, that is something state judges are able and well equipped to do. It is something state judges do every day.[47]

Moreover, it makes sense to apply rendition law in situations like the one presented here. What connection does Michigan have to the continued viability of an Indiana Judgment, based on facts divorced entirely from Michigan? The only reason this

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[47] State judges make conflict of law decisions every day in tort and contract cases. State courts are also required to apply federal law when the situation calls for it. *See Testa v. Katt*, 330 U.S. 386, 389-94 (1947).

Judgment was deemed "unpaid" is because of the happenstance of Clapper's ownership of Michigan property. But as this Court has held:

> [F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.[48]

Michigan, respectfully, does not have the power to augment the Indiana judgment in to something else or make it something that it is not, particularly when Michigan has no stake, policy, or interest in whether or not the Judgment is domesticated and enforced. Allowing what occurred in Michigan's state courts is the opposite of full faith and credit, when Indiana would no longer recognize the Judgment. "[T]he key issue is whether the Judgment is enforceable where rendered . . . ." What, then, would Indiana do?[49] And in answering that question, everyone agrees what Indiana would do; it would deem the Judgment paid.

Furthermore, there are recognized exceptions to giving full faith and credit to judgments of sister states, like when the rendition state lacked personal jurisdiction over the defendant, or when the judgment

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[48] *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003).

[49] *See In re Transamerica Airlines, Inc.*, No. Civ.A. 1039-VCP2007 WL 1555734, *8 (Del.Ch. May 25, 2007)

was procured by fraud. Rendition state law, not a domesticating state's law, governs those collateral defenses to the judgment.[50]

By analogy, Clapper's approach is consistent with what federal courts do when domesticating a diversity judgment from another federal court in another state: "[A]n enforcing court should apply the law of the state courts in the state where the rendering federal court sits . . . ."[51] By way of example, a federal court applies the rendering state's preclusion law to determine the preclusive effects of a state court's final judgment.[52]

Requiring the application of rendition law would also support uniformity. One of the purposes of the full faith and credit clause is to make a final decision of one court uniform throughout the United States, protecting the integrity of the rendition state and giving legal clarity to rights of the parties to that

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[50] *See, e.g., Griffin v. Griffin*, 327 U.S. 220 (1946) (petitioner's challenge, based on due process and fraud, to respondent's efforts to domesticate a New York judgment in the District of Columbia should be analyzed by New York law); *Capitol Indem. Corp. v. St. Paul Fire & Marine Ins. Co.*, 357 F.Supp. 399, 410 (D.C.Wis. 1972) ("Under 28 U.S.C. § 1738, the amended judgment must be given the same effect and credit as it would receive in the courts of Wisconsin, where it was rendered. Wisconsin law must govern the available grounds for collateral attack.").

[51] *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc.*, 404 F.3d 1297, 1310 (11th Cir. 2005).

[52] *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

action.[53] To open up the continued validity of a judgment to the interpretation of fifty state laws would undermine uniformity. The parties' rights and duties were judged according to Indiana law in an Indiana court, leading to an Indiana judgment. The continuing validity of the judgment should therefore be judged in accordance with Indiana law, not the law of the state where the defendant happens to own property. The fact that the Indiana Judgment and the now-domesticated Michigan Judgment will be treated markedly different undercuts the salutary purpose of the full faith and credit clause.

In spite of all this, the Michigan Court of Appeals held that "We apply Michigan law to these enforcement proceedings." While state courts may prefer to apply their own laws for their own reasons (be they based on reasons of sovereignty, ease, or parochial attitudes), "The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation. If in its application local policy must at times be required to give way, such 'is part of the price of our federal system."[54] If full faith and credit means what it says, then under these facts, the Judgment should be satisfied, regardless of Michigan's approach to domesticating and enforcing judgments.

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[53] *See Underwriters Nat. Assur. Co. v. North Carolina Life and Acc. and Health Ins. Guaranty Ass'n*, 455 U.S. 691, 704 (1982).

[54] *Sherrer v. Sherrer*, 334 U.S. 343, 354 (1948) (internal quotes omitted).

Why didn't Clapper seek such a determination in Indiana? He tried. When Clapper made the strawman and payment arguments, the Indiana trial judge ordered expedited discovery on the issues. ART ***immediately*** caused TacCo (which had literally *just* been incorporated) to remove the case to an Indiana federal court, whereupon the case was transferred to a federal bankruptcy court in Texas, where things were stalled for a substantial time.[55] When Clapper tried to present his strawman and payment arguments to the bankruptcy court, the court believed it was not the appropriate fora for such resolution because of its limited jurisdiction and because "allegations of a strawman transaction requires the application of Indiana law . . . ."[56] TacCo then moved for summary disposition in the Michigan trial court, which dealt with the issue swiftly. And here we are.

A grave injustice has occurred. This Court has the opportunity to right what was wrong and at the same time publish what full faith and credit means when the rendition state's law says one thing and the domesticating state's law says another. Full faith and credit is fundamental to America's idea of what it means to be a federal union of states. As such, a rule of law should be fashioned with deft precision and crystal clarity.

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[55] **PBIOSD**, pp. 4-5; **PBOA**, p. 1. Case Nos. 02-42876-S; 02-04271 (Bankr. E.D. Tx.)(Hon. Donald R. Sharp)

[56] **PBIOSD**, pp. 4-5; **PBOA**, p. 1. **PBOA, Ex. 31**, p. 8 (August 12, 2003 Order of the U.S. Bankruptcy Court for the Eastern District of Texas (Case No. 02-42876-S) (Hon. Donald R. Sharp).

Because the stakes are high, both personally and jurisprudentially, we respectfully submit that this is a case that this Court should review.

## CONCLUSION

For the foregoing reasons, Petitioner David Clapper respectfully requests that the Court grant his petition, and issue a writ of certiorari to the Michigan Court of Appeals.

Respectfully submitted,

SICILIANO MYCHALOWYCH
VAN DUSEN AND FEUL, PLC

By: Andrew W. Mychalowych
*Counsel of Record*
Lindsay James
37000 Grand River Avenue,
Suite 350
Farmington Hills, MI 48335
248.442.0510
Attorneys for Petitioner David M. Clapper

# APPENDIX

# APPENDIX A

## STATE OF MICHIGAN COURT OF APPEALS

## UNPUBLISHED

**No. 271525**
**LC No. 2002-042917-CZ**

**[Filed February 1, 2007]**

TACCO FALCON POINT, INC.,
Plaintiff/Counter-Defendant-Appellee,

v

DAVID M. CLAPPER,
Defendant/Counter-Plaintiff/
Third-Party Plaintiff-Appellant/
Cross-Appellee,

v

ART MIDWEST, INC.,
Intervening Third-Party Defendant-
Appellee/Cross-Appellant,

and

AMERICAN REALTY INVESTORS, INC.,
Third-Party Defendant-Appellee,

and )
)
AMERICAN REALTY TRUST, INC., )
Third-Party Defendant-Appellee/ )
Cross-Appellant, )
)
and )
)
ART MIDWEST, L.P., )
Third-Party Defendant. )
_____ )

**No. 271552**
**Oakland Circuit Court**
**LC No. 2005-066850-CZ**

_____

DAVID M. CLAPPER, )
Plaintiff-Appellant, )
)
v )
)
TACCO FALCON POINT, INC., )
Defendant-Appellee. )
_____ )

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant David Clapper (Clapper) appeals as of right from the circuit court's order granting summary disposition to plaintiff TacCo Falcon Point, Inc. (TacCo). The court concluded that Clapper was liable to TacCo under a consent judgment signed in Indiana. Clapper takes exception to this ruling and also to a

ruling by the court that dismissed third-party defendant American Realty Investors (ARI) from the case. Third-party defendant American Realty Trust, Inc. (ART) cross-appeals, arguing that the court erred in rejecting ART's argument that Clapper's third-party contribution claim against ART was invalid and that ART was therefore entitled to summary disposition. Intervening third-party defendant Art Midwest, Inc (ARTM), a court-appointed liquidator of defendant Art Midwest, L.P. (ARTMLP) (one of the entities sued by Clapper for contribution), also cross-appeals, arguing that the circuit court should have granted summary disposition to ARTM with respect to Clapper's claims against ARTMLP, because ARTMLP has been dissolved. We affirm in all respects except with regard to the claims involving (1) the dissolution of ARTMLP and (2) the liability of ARI.

ART and a related entity, along with Clapper and his related entity, defaulted on a loan owed to Inland Mortgage Company (Inland). The loan had been made in connection with the purchase of an apartment complex in Indiana. After litigation in Indiana, ART and Inland reached a settlement whereby Inland agreed to reduce its claim from nearly $3,400,000 in exchange for entry of a judgment for $3,200,000. The judgment provided that ART and Clapper were jointly and severally liable for the $3,200,000. Clapper's attorney signed the consent judgment.

Inland later assigned the judgment to TacCo in exchange for a payment of $3,000,000. $1,500,000 was paid up front, and TacCo signed a note for the remaining $1,500,0000. Inland retained a security interest in the judgment. The assignment agreement

required that TacCo make a minimum creditor's bid of $1,000,000 at the Sheriff's sale of the apartment complex. TacCo did so, and, because it was the only bidder, it acquired the property. The amount due under the judgment was therefore reduced to $2,200,000. TacCo then filed the instant Michigan action to enforce the judgment against Clapper, who resides in Michigan.

Clapper and TacCo filed motions for summary disposition. Clapper argued, in part, that ART had actually incorporated TacCo and that the entities should be considered one and the same for purposes of enforcing the judgment. Clapper argued that, in accordance with the "strawman" defense available under Indiana law, the judgment must be deemed *satisfied* (and therefore extinguished as applied to Clapper) because Inland, in assigning the judgment to TacCo, had in actuality assigned the judgment to one of the debtors, ART. Clapper argued, in essence, that ART had used a strawman, TacCo, in order to keep the judgment alive as applied to Clapper. The circuit court rejected Clapper's arguments, stating that the law of Michigan applied to the instant action and that the strawman defense is not available in Michigan. The court, after addressing additional defenses raised by Clapper, granted TacCo's motion for summary disposition, which TacCo had brought under MCR 2.116(C)(10).

On appeal, Clapper first argues that the court erred in rejecting the strawman defense, and, accordingly, in granting summary disposition to TacCo.

We review do novo a trial court's grant or denial of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

> A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ.

The moving party has the initial burden of supporting its position that there is no genuine issue of material fact by pointing to affidavits, depositions, admissions, or other documentary evidence in the record. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the nonmoving party to show that a genuine issue of material fact does exist. *Id.*

Clapper contends that Indiana law, and particularly the strawman defense available under Indiana law, should apply to the present action. We disagree. In MCL 691.1171, Michigan adopted the Uniform Enforcement of Foreign Judgments Act, which provides as follows in MCL 691.1173:

> A copy of a foreign judgment . . . may be filed in the office of the clerk of the circuit court, the district court, or a municipal court of this state.

> The clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court, the district court, or a municipal court of this state. *A judgment filed under this act has the same effect* and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying *as a judgment of the circuit court*, the district court, or a municipal court *of this state* and may be enforced or satisfied in like manner. [Emphasis added.]

Furthermore, in *Baker v General Motors, Corp*, 522 US 222, 235; 118 S Ct 657; 139 L Ed 2d 580 (1998), the U.S. Supreme Court held that

> [f]ull faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.

Similarly, the Restatement (Second) of Conflict of Laws § 99 (1969) provides that "[t]he local law of the forum determines the methods by which a judgment of another state is enforced."

Under the above authorities, the circuit court correctly concluded that Michigan law, not Indiana law, controls with regard to the present action. Clapper argues that the above authorities are not dispositive because his primary argument is not

concerned with TacCo's manner of enforcing the judgment but instead concerns whether the judgment has been satisfied (and therefore extinguished as applied to Clapper). Clapper's argument elevates form over substance. Clearly, TacCo is seeking to enforce the judgment against Clapper, and Clapper is resisting that enforcement by raising various arguments, including the strawman argument. These various issues, dealing with the enforcement of the judgment, are governed by Michigan law. *Baker*, *supra* at 235. To further support his claim, Clapper cites the Restatement (Second) of Conflict of Laws § 115 (1971), which states that "[a] judgment will not be recognized or enforced in other states if upon the facts shown to the court equitable relief could be obtained against the judgment in the state of rendition." However, Clapper has cited no basis for obtaining equitable relief against the judgment, which was a validly signed and entered consent judgment. Instead, Clapper is merely trying to avoid enforcement of the judgment based on actions that occurred after the valid entry of the judgment. Clapper also cites the Restatement (Second) of Conflict of Laws § 116 (1971), which states that "[a] judgment will not be enforced in other states if the judgment has been discharged by payment or otherwise under the local law of the state of rendition." Here, the judgment has *not* been discharged and there is certainly no satisfaction of judgment found in the record. Indeed, the consent judgment, under which Clapper is liable, remains in effect, and TacCo is seeking to enforce it. Clapper also cites the case of *Ward v Hunter Machinery Co*, 263 Mich 445, 456; 248 864 (1933), in which the Court stated that

> [t]he judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced, and . . . whatever pleas would be good to a suit thereon in such state, and none others, [can] be pleaded in any other court in the United States. [Citation and quotation marks omitted.]

Again, however, the consent judgment is not being challenged here. Instead, Clapper is trying to avoid enforcement of the judgment. We apply Michigan law to these enforcement proceedings. *Baker*, *supra* at 235.

Clapper argues that, even if Indiana law does not apply here, the circuit court nonetheless erred in granting summary disposition to TacCo because the strawman defense is in fact recognized in Michigan. We disagree. Clapper has not cited any binding or persuasive authority indicating that the strawman defense, whether referred to as such or referred to by another name, is recognized in Michigan. Clapper additionally argues that we must deem the judgment satisfied in this case because to do otherwise would be contrary to public policy. Clapper states in his appellate brief:

> It would be inherently unfair and unjust, thus against public policy, to allow a co-judgment debtor to satisfy a judgment[] (like ART did with Inland), and then arrange for the assignment of the judgment to an entity later created and then controlled by the co-judgment debtor, for purposes of enforcing the entire

> judgment only against other co-judgment debtors, i.e. Clapper.

Clapper's argument is unavailing. Indeed, Clapper *consented* to the entry of the judgment, and nothing precludes him from seeking contribution against ART. In fact, as stated elsewhere in this opinion, the circuit court granted Clapper's motion for summary disposition against ART with regard to Clapper's contribution claim.[1] Nothing unfair or unjust occurred here. Nor do we find merit to Clapper's argument that failing to deem the judgment satisfied here would set a precedent for judgment creditors to "forum shop." This is not a persuasive argument because a creditor would not be able simply to choose a forum that had no connection to the pertinent parties.

Clapper additionally argues that the intent of Inland and TacCo was to deem the judgment satisfied after the assignment of the judgment to TacCo. This was clearly not the case, given that Inland retained a security interest in the judgment. Clapper also suggests that the assignment of the judgment to TacCo resulted in a reduction of the judgment because a principal of Inland admitted that "[i]f the judgment

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[1] The dissent suggests that ART, "being the alleged alter ego of TacCo, essentially pays nothing for the property . . . ." This is not an accurate characterization. Assuming, for purposes of argument, that ART was TacCo's alter ego, then TacCo/ART paid $1,000,000 at the Sheriff's sale *and* is subject to Clapper's 50% contribution claim (amounting to approximately $1,100,000). As noted, the trial court granted summary disposition to Clapper with regard to the contribution claim, and we are affirming that decision on appeal.

ever comes back into [Inland's] hands . . . ART gets credit for the one million five . . . because they [ART] paid it." This suggestion is nothing more than a partial reiteration of the strawman defense discussed earlier. In other words, Clapper is arguing that the judgment was satisfied, in part, because it was ART that made the payment to Inland. We have already rejected the strawman argument and will not reiterate our holding here. Inland assigned to TacCo the right to collect on the full judgment, in exchange for consideration paid by TacCo. TacCo now has the right to collect on the full judgment.

As an alternative basis for reducing the amount of the judgment, Clapper argued in the circuit court that the price paid by TacCo for the apartment complex at the Sheriff's sale was inadequate, that the sale was essentially equivalent to a fraudulent conveyance, and that the inadequate price resulted in the judgment against Clapper being higher than it should have been. Clapper indicated, among other things, that the property had been appraised at $1.95 million a few months after the sale. The circuit court rejected Clapper's arguments, stating, with regard to the appraisal, that the evidence demonstrated that a property might actually sell at twenty-five percent less than the appraisal price. The court also stated that "the fact that a better price could have been obtained is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner."

Clapper now reiterates his arguments on appeal, and we find no error requiring reversal. Alleged price inadequacy is not a valid reason to vitiate a foreclosure sale, if the proceedings were fair and regular. *Chabut*

*v Chabut*, 66 Mich App 440, 448; 239 NW2d 401 (1976). Clapper has produced insufficient evidence that any procedural impropriety occurred with respect to the Sheriff's sale.[2]

Under all the circumstances, the circuit court did not err in granting TacCo's motion for summary disposition.[3]

Clapper next argues that the circuit court erred in dismissing his contribution claim against ARI. The court granted summary disposition to Clapper with respect to his contribution claim against ART but dismissed his claim against ARI. The court stated: "Although Defendant states numerous times in its pleadings and argument that ARI is the successor of ART, he provides no evidentiary support for that allegation and, thus, there is no basis for contribution as to ARI."

Clapper moved for summary disposition under MCR 2.119(C)(9) and (C)(10). This court's obligations when reviewing a summary disposition motion brought under MCR 2.116(C)(10) are discussed above. "Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim." *Village of Dimondale v Grable*, 240 Mich App

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[2] We also note that the appraised price was not dispositive, given that the appraisal witness did indeed indicate that the price obtained at a foreclosure sale could be more than twenty-five percent less than the appraised price.

[3] Accordingly, the circuit court also did not err in denying Clapper's motion for summary disposition.

553, 564; 618 NW2d 23 (2000). In reviewing a motion brought under MCR 2.116(C)(9), we accept "all well-pleaded allegations as true" and will grant the plaintiff's motion if the defenses are untenable as a matter of law. *Id.* We note, however, that the circuit court did not merely deny Clapper's motion for summary disposition with regard to the contribution claim against ARI. Instead, it went a step further and dismissed the claim against ARI, even though ARI had not itself moved for summary disposition on the basis of its not being, in actuality, the successor to ART. Evidently, the court's ruling was based on MCR 2.116(I)(2), which states: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment without delay."

ARI argues that the circuit court correctly dismissed the case against it because Clapper presented insufficient documentary evidence to prove that ARI was ART's successor. However, Clapper *did* produce documentary evidence to this effect, including a Securities and Exchange Commission report that states that ARI "is the successor through merger" to ART. ARI argues that this Court should not consider the documentary evidence because it was submitted with a reply brief and not with Clapper's original motion for summary disposition. The fact that Clapper did not attach documentary evidence to his original motion for summary disposition was sufficient for the circuit court to have denied Clapper's motion regarding ARI. However, as noted above, the court not only denied Clapper's motion but also *granted* summary disposition to ARI, despite the fact that ARI did not move for summary disposition on the basis in question.

This dismissal of ARI was erroneous, given that, at the very least, Clapper raised a genuine issue of material fact regarding whether ARI was the successor to ART.[4]

In its cross-appeal, ART contends that the circuit court erred in denying its motion for summary disposition with regard to Clapper's contribution claim.[5] ART moved for summary disposition under MCR 2.116(C)(6) and (C)(8). MCR 2.116(C)(8) allows for summary disposition if "[t]he opposing party has failed to state a claim on which relief can be granted." In reviewing a motion brought under this subrule, "we assume that all factual allegations in the nonmoving party's pleadings are true and determine if there is a legally sufficient basis for the claim." *Salinas v Genesys Health System*, 263 Mich App 315; 688 NW2d 112 (2004). MCR 2.116(C)(6) allows for summary disposition if "[a]nother action has been initiated between the same parties involving the same claim." In reviewing a motion brought under MCR 2.116(C)(6), we consider the "[a]ffidavits, depositions, admissions, and documentary evidence offered," MCR 2.116(G)(5), and determine whether the two suits were "based on

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[4] ARI, as alternative bases for us to affirm the dismissal of the third-party claim against it, raises arguments similar to those raised by ART and discussed later in this opinion. We reject ARI's arguments for the same reasons that we reject the similar arguments raised by ART.

[5] Although this fact is not emphasized by ART on appeal, we reiterate that the circuit court, in addition to denying ART's motion for summary disposition, *granted* Clapper's motion for summary disposition with respect to the contribution claim against ART.

the same or substantially same cause of action." *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660; 341 NW2d 783 (1983).

ART first contends that Clapper was not permitted to sue ART, a joint obligor, until Clapper had paid more than his share of the joint obligation. See *Kalamazoo Trust Co v Merrill*, 159 Mich 649, 655; 124 NW 597 (1910) ("[o]ne joint obligor may not sue another joint obligor, upon their common obligation, until he has paid the debt, or a larger portion thereof than, as between himself and his co-obligor, he would be liable to pay"), and *Kelly v Sproul*, 153 Mich 691, 692-693; 117 NW 327 (1908) ("the right of action for contribution does not accrue until payment is made"). See also *Sziber v Stout*, 419 Mich 514, 534; 358 NW2d 330 (1984). ART contends that Clapper had *not* in fact paid more than his share of the joint obligation and therefore could not proceed against ART. The circuit court, in ruling on this issue, perfunctorily stated that Clapper need not have paid more than his share of the obligation before suing ART.

We conclude that no error requiring reversal occurred. First, Clapper did not file a separate lawsuit against ART but instead filed a third-party complaint. This was explicitly authorized under MCR 2.204(A)(1), which states, in pertinent part: "[A]ny time after commencement of an action, a defending party, as a third-party plaintiff, may serve a summons and complaint on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim." Second, plaintiff deposited the amount of TacCo's judgment with the circuit court. Clapper admits in his appellate brief that "[i]f Clapper

is unsuccessful on his appeal as to the TacCo issues, then TacCo will be entitled to the entire $2.5 million." The circuit court was mindful of Clapper's possible payment to TacCo and explicitly stated, in its order, as follows:

> [J]udgment is hereby entered in the amount of 50% (fifty percent) of the amount paid by Third-Party Plaintiff to Plaintiff, provided that execution of this judgment is precluded until payment by Defendant/Third-Party Plaintiff of an amount in excess of 50% of Plaintiff's judgment against Defendant/Third-Party Plaintiff, in which even Defendant/Third-Party Plaintiff may have execution of this Judgment against Third-Party Defendant ART for the excess.

Therefore, the court indicated that Clapper would not, in actuality, be able to successfully execute his claim against ART until *after* Clapper paid TacCo. Under the circumstances, we find no viable basis on which to reverse the circuit court's ruling.

ART argues that MCR 2.204(A)(1) was not applicable here because the instant action was nothing more than an action to domesticate a judgment, "i.e., to determine whether the Indiana court had jurisdiction over Clapper such that its determination with respect to Clapper should be recognized against Clapper in Michigan." ART states that because this action was merely an action to domesticate a judgment, there was no possible way that ART could be liable to Clapper for TacCo's claim. The circuit court rejected this argument, stating that the case involved

the *enforcement* of a judgment and that Clapper's contribution claim could proceed. We again find no basis for reversal. TacCo filed a complaint to enforce the judgment, and the resultant lengthy litigation has revolved around whether Clapper should be responsible for paying the amount owed under the judgment. Clearly, Clapper's liability for paying the judgment has been a central issue in the case, and, as noted above, Clapper has deposited the amount of TacCo's judgment with the circuit court. Because Clapper's liability for paying the judgment has been at issue, ART's liability for contribution has also been at issue. Reversal is unwarranted.

ART next argues that the circuit court should have granted its motion for summary disposition under MCR 2.116(C)(6) because a substantially identical claim had been filed by Clapper against ART in a federal court in Texas. However, the Texas lawsuit sought indemnification and was based on an indemnification agreement. "Contribution and indemnification are separate and distinct claims." *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 248; 533 NW2d 15 (1995). In the present case, Clapper is seeking not indemnification but contribution, asserting that he is entitled to contribution from ART by virtue of the fact that ART is a co-judgment debtor. See *Caldwell v Fox*, 394 Mich 401, 417 231 NW2d 46 (1975). Given these circumstances, summary disposition under MCR 2.116(C)(6) was not warranted.

Next, ARTM argues that the circuit court, in reviewing Clapper's motion for summary disposition against ART and ARTMLP with regard to the contribution claim, should have granted summary

disposition to ARTMLP under MCR 2.116(I)(2) because ARTMLP had been dissolved. As noted earlier, MCR 2.116(I)(2) states: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment without delay."

In June 2003, a United States District Court in Texas entered a final judgment that dissolved ARTMLP, appointed ARTM and ARI as a co-liquidators to wind up and liquidate the partnership, and ordered them to submit appropriate documentation for the windup. The Texas District Court approved the windup plan on January 7, 2004, and on July 14, 2004, ARTM filed a Certificate of Cancellation of Domestic Limited Partnership with the Texas Secretary of State.

On June 13, 2006, in ruling on ARTM's argument below, the circuit court correctly noted that Clapper's third-party complaint against ARTMLP was filed "after dissolution began but before the certification of cancellation was filed." The court concluded that, under Texas law, a partnership can "defend a civil . . . action" during the "winding up process." The court stated: "Thus, because this case was filed in 2002 before the certificate of cancellation was filed in July 2004, the defendant may proceed against [ARTMLP]." However, as noted above, the Texas court approved the windup plan for ARTMLP on July 14, 2004. In that windup plan, ARTM and ARI stated the following:

> Because no assets are left in the Partnership, no further action is required to wind up the Partnership other than for this

> Court to approve the winding up . . . and, after the Court enters such order, for a certificate of cancellation of domestic limited partnership to be filed with the State of Texas.

As also noted above, ARTM filed the certificate of cancellation on July 14, 2004. Under these circumstances, it is clear that ARTMLP had been *cancelled* at the time of the circuit court's ruling in this case. Accordingly, the circuit court erred in failing to grant summary disposition to ARTM with regard to the contribution claim against ARTMLP. Clapper argues that a partnership may still be sued during the dissolution process and that part of the windup procedure necessarily involves the resolution of outstanding court cases. However, that argument was pertinent *to the Texas action governing the dissolution of the partnership*.[6] On the record before us, we have no choice but to conclude that the partnership was cancelled as of July 14, 2004, and that the circuit court therefore should have dismissed Clapper's contribution claim against ARTMLP.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Alton T. Davis

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[6] Clapper had notice of and participated in the Texas proceedings.

O'CONNELL, J. *(dissenting).*

I respectfully dissent. I would vacate the trial court's decision to grant summary disposition and would remand this case for a full evidentiary hearing to determine both whether the original judgment has been satisfied and to determine the individual responsibilities of each defendant involved in this litigation.

It appears to me that the trial court and the majority opinion conflate the concept of full faith and credit with the concept of satisfaction of judgment. In the present case, I concur with the majority opinion that a foreign judgment is entitled to full faith and credit. However, based upon this lower court record, I am unable to determine if this judgment has been satisfied.[1]

It is simply common sense to conclude that you cannot enforce a judgment that has been satisfied. In the present case, the trial court refused to conduct an evidentiary hearing to determine if the foreign judgment had been satisfied, and the majority opinion seems willing to allow plaintiff to collect on a judgment whether or not it has already been satisfied.

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[1] The majority and the trial court also conflate the issues of whether enforcement proceedings are available and whether the judgment has been satisfied. I concur with the majority that we apply Michigan law to enforcement proceedings. However, I note there is no enforcement proceeding if the judgment has been satisfied.

Defendant Clapper is not attempting to raise any defenses regarding the validity of the foreign judgment; in fact, he admits that it is a valid judgment. His position is that the judgment has been paid.[2]

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[2] Defendant Clapper raises a significant issue that should be examined on remand. Clapper contends that plaintiff TacCo Falcon Point, Inc., (TacCo) and the balance of the parties to this litigation are perpetrating a shell game. The end result of the shell game is that Clapper is responsible to pay $2.5 million for investment property, but TacCo and the other parties to this litigation end up with fee simple title to the investment property that secured the original mortgage. Based upon this lower court record, I am unable to determine if this is the result of legitimate corporate activity, or if plaintiff is using the judicial systems in Michigan, Indiana, and Texas to divert the Court's attention from the fact that the consent judgment has already been paid by the liable parties.

Defendant Clapper alleges that American Reality Trust, Inc. (ART) and he were responsible to Island Mortgage Company (Island) for a mortgage in excess of $3 million and that they defaulted and later entered into a consent judgment with Island. The shell game begins when ART's alleged alter ego TacCo purchases both the consent judgment and the property and makes a partial payment on the consent judgment and mortgage. The shell game continues with court proceedings in Texas, Indiana, and Michigan, concluding with collection proceedings in Michigan against defendant Clapper. Amazingly, Clapper ends up paying full price for the property but TacCo ends up with fee simple title to the investment property. ART, of course, being the alleged alter ego of TacCo, essentially pays nothing for the property but ends up with the benefit of the original transaction (original price - Clapper payment = 0). From this record I am unable to determine how such an event occurred or even if it occurred. However, on remand and after an evidentiary hearing, the trial court could

I would vacate the lower court judgment and remand to the trial court to conduct an evidentiary hearing to determine if this judgment has been paid and, if paid, the individual defendants' relative responsibilities for indemnification and contribution. Because of the multifaceted issues in this case, I would direct the trial court to issue a comprehensive written opinion that addresses all of the issues that are presented at the evidentiary hearing. I would also direct the trial court to allow testimony on the relationships of all of the parties (i.e., whether they are alter egos of the original corporation, whether the stockholders are related, etc., and the various corporations). Finally, the trial court should make specific findings on why it was necessary to use numerous corporations and both the federal and state courts to perform the relatively simple task of executing a judgment.

/s/ Peter D. O'Connell

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determine whether the Michigan court system is being used to further the ends of a shell game and should deal with this case accordingly.

## APPENDIX B

**STATE OF MICHIGAN OAKLAND COUNTY**
**SIXTH JUDICIAL CIRCUIT**

Court Address 1200 N. TELEGRAPH RD DEPT 404
PONTIAC MI 48341-0404

**No. 2002-042917-CZ**

**[Filed June 1, 2006]**

| | |
|---|---|
| TacCo Falcon Pointe, Inc. PLAINTIFF(S) | ) |
| v. | ) |
| David M. Clapper, et al. DEFENDANT(S) | ) |

**ORDER**

For reasons stated on the record on May 31, 2006;

Plaintiff's Motion for Summary Disposition as to Defendant, seeking enforcement of its domesticated Judgment, is granted in its entirety and all of Defendant's claims and defenses as to Plaintiff are dismissed.

Defendant's Motion for Summary Disposition as to Plaintiff is denied.

Defendant/Third-Party Plaintiff's Motion for Summary Disposition as to Third-Party Defendant American Realty Trust, Inc. ("ART") is granted and judgment is hereby entered in the amount of 50% (fifty percent) of the amount paid by Third-Party Plaintiff to Plaintiff, provided that execution of this judgment is precluded until payment by Defendant/Third-Party Plaintiff of an amount in excess of 50% of Plaintiff's judgment against Defendant/Third-Party Plaintiff, in which event Defendant/Third-Party Plaintiff may have execution of this Judgment against Third-Party Defendant ART for the excess.

Defendant Third-Party Plaintiff's Motion for Summary Disposition brought as to Third-Party defendant American Realty Investors, Inc. ("ARI") is denied, and Defendant/Third-Party Plaintiffs claim against ARI is dismissed.

Defendant Third-Party Plaintiff's Motion for Summary Disposition is denied to the extent it seeks a judgment for contribution as to ART Midwest, LP.

Approved as to Form only:

/s/ Andrew W. Mychalowych
Attorney for Defendant

/s/ Peter A. Jackson
Attorney for ART and ARI

/s/ Steven R. Lefkofsky
Attorney for Plaintiff

| 6/1/06 | /s/ | P17653 |
|---|---|---|
| DATE | FRED M. MESTER, Circuit Judge | BAR NO. |

## APPENDIX C

**MICHIGAN SUPREME COURT**
**LANSING, MICHIGAN**

**SC: 133430**
**COA: 271525**
**Oakland CC: 2002-042917-CZ**

**[Filed June 4, 2008]**

TACCO FALCON POINT, INC.,
Plaintiff/Counter-Defendant-Appellee,

v

DAVID M. CLAPPER,
Defendant/Counter-Plaintiff/
Third-Party Plaintiff-Appellant/
Cross-Appellee,

v

ART MIDWEST, INC.,
Intervening Third-Party
Defendant-Appellee,

and

AMERICAN REALTY INVESTORS, INC.,

and AMERICAN REALTY TRUST, INC., )
Third-Party Defendants-Appellees/ )
Cross-Appellants, )
)
and )
)
ART MIDWEST, L.P., )
Third-Party Defendant. )
)

On order of the Court, the application for leave to appeal the February 1, 2007 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J., would remand this case to the trial court for the reasons stated in the Court of Appeals dissenting opinion.

[Seal of the Michigan Supreme Court]

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 4, 2008 Corbin R. Davis
Clerk

Supreme Court, U.S.
FILED
OCT 2 - 2008
OFFICE OF THE CLERK

No. 08-273

# In the Supreme Court of the United States

DAVID M. CLAPPER,

*Petitioner*,

v.

TACCO FALCON POINT, INC.,

*Respondent*.

*On Petition for Writ of Certiorari to the Michigan Court of Appeals*

## BRIEF IN OPPOSITION

STEVEN R. LEFKOFSKY
LEFKOFSKY & GOROSH, PC
31500 NORTHWESTERN HWY.
SUITE 105
FARMINGTON HILLS, MI 48334
(248) 855-5508

JOHN FREDERICK REDWINE
*Counsel of Record*
REDWINE LAW FIRM
1800 VALLEY VIEW LANE
SUITE 120
DALLAS, TX 75234
(972) 484-7782

*Counsel for Respondent*

October 2, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## QUESTIONS PRESENTED

The question presented by Petitioner is not only misleading and inaccurate, but is predicated on a false recitation of the proceedings in Michigan.

First, Petitioner asserts in this section of his brief that, in Michigan, the Respondent conceded that under *Indiana substantive law*, the judgment at issue would be deemed satisfied. This is completely false. In fact, Respondent was not silent on this issue in Michigan, but rather argued repeatedly that, even under Indiana law, Petitioner's satisfaction argument fails. For Petitioner to now falsely represent to this Court that admissions or concessions were made in the lower courts that were, in fact, never made, is not only disingenuous, but intentionally misleading.

Next, as a result of the application of Michigan law to Petitioner's enforcement defenses, Petitioner states that the "Michigan courts therefore ruled that the Indiana judgment may be domesticated and enforced in Michigan, even though the state of rendition (Indiana) would deem the judgment satisfied." This statement is misleading on 2 separate grounds. First, the Michigan courts never addressed the application of Petitioner's defenses to the *domestication* of the judgment. Since there was no dispute regarding the validity and entry of the judgment in Indiana, its domestication was essentially automatic. Second, the Michigan courts never determined that Indiana "would deem the judgment satisfied". Again, this is an utterly false and intentionally misleading representation of the proceedings that occurred in Michigan.

Finally, the question presented by Petitioner does not comport with the proceedings of the lower courts. First, there is no issue regarding the domestication of the judgment. Petitioner has never opposed or appealed the order of the Trial Court domesticating the judgment at issue. It is only Respondent's right to enforce the judgment that Petitioner appealed. Second, the real question being presented to this Court (and which is simply not worthy of review) is whether Petitioner, by challenging Respondent's ability to enforce, and collect upon, the judgment, was merely raising defenses to the enforcement of the judgment in Michigan, thereby subjecting these defenses to the application of Michigan law.

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## COUNTER STATEMENT OF THE CASE

During the course of more than 6 years of legal proceedings, Petitioner has demonstrated a penchant for misstating the facts and history of this dispute. The brief filed with this Court is no different. To establish a clear and accurate record, Respondent makes the following "corrections" to the Petitioner's Statement of the Case:

1. Petitioner states that on February 19, 2002, Inland Mortgage Corporation ("Inland") "secured" a judgment in Indiana state court (the "Judgment") against Petitioner and others. Petitioner, however, has conveniently failed to inform this Court that the Indiana Judgment was a "consent judgment", entered into freely and willingly by Petitioner. As such, Petitioner has not (and cannot) contest the validity or entry of the Judgment.

2. While Petitioner correctly states that the Michigan Trial Court and Court of Appeals found that Michigan law applied to the enforcement of the Judgment in Michigan, and that under Michigan law the Judgment had not been satisfied, Petitioner also represents to this Court that the Trial Court agreed that under Indiana law the Judgment would be deemed satisfied. This statement is patently false. Interestingly, Petitioner fails to attach to his brief a copy of the transcript from the Trial Court's decision. This is no accident. Petitioner has intentionally omitted this transcript because nowhere in its opinion did the Trial

> Court find that Judgment would be deemed satisfied under Indiana law. (A copy of the May 31, 2006, Transcript of Hearing of Oakland County Circuit Court is reproduced in Appendix A, App. 1b.)

Essentially, the Trial Court held that Petitioner's defenses were not an attack on the validity of the Judgment itself, but rather defenses to the enforcement of the Judgment (Respondent was seeking to enforce, and collect upon, a valid Judgment entered by an Indiana state court). As such, the Trial Court held that Michigan law applied in determining the validity of all of Petitioner's defenses under the Uniform Enforcement of Foreign Judgments Act, and in accordance with the Full Faith and Credit Clause of the United States Constitution. Based on the undisputed fact that Respondent had never received payment on the Judgment, and Michigan does not recognize the "strawman" theory being espoused by Petitioner, the Trial Court found that Respondent was now free to enforce and collect upon the Judgment.

In a 2 to 1 decision, and in all respects, the Michigan Court of Appeals affirmed the holding of the Trial Court. In short, the Court of Appeals found that (i) this was an enforcement proceeding (regardless of how Petitioner tried to characterize it), (ii) Michigan law, not Indiana law, therefore applied to the defenses Petitioner raised in this action, and (iii) Michigan law does not recognize the "strawman" defense raised by Petitioner.

Lost on Petitioner is the fact that the domestication in Michigan of a valid Indiana Judgment is in

compliance with, and precisely the purpose of, the Full Faith and Credit Clause of the United States Constitution. Once Michigan gives full faith and credit to a valid foreign judgment, the enforcement of that judgment by the judgment holder, in this case Respondent, is governed by the laws of the forum state, in this case Michigan. Petitioner is not arguing, nor has he ever argued, that the Judgment is somehow flawed, invalid, or otherwise subject to attack. Rather, he argues that it has been satisfied under Indiana law as a result of post-judgment events. This argument goes directly to the ability to enforce the Judgment, and is therefore subject to Michigan law.

## COUNTER STATEMENT OF THE FACTS

Similar to Petitioner's Statement of the Case, Petitioner has also misrepresented to this Court the factual background of this dispute. As such, although Respondent believes the factual background giving rise to the entry of the Judgment is immaterial to this Court's determination of whether to review the holdings of the Trial Court and Michigan Court of Appeals, Respondent is nevertheless compelled once again to identify for this Court factual misrepresentations made by Petitioner in his brief. Rather than try to correct each misstatement individually (there are too many to be able to do this efficiently), Respondent instead will identify for this Court the undisputed facts that led the lower courts to determine, as a matter of law, that Respondent was entitled to summary disposition and the right to enforce the Judgment. These facts are as follows:

1. Petitioner guaranteed payments to Inland with respect to a loan that Inland made, and which was secured by an apartment complex in Indiana.

2. Through a series of unrelated transactions, third-party defendant American Realty Trust, Inc. ("ART") became a co-debtor with Petitioner with respect to the Inland loan.

3. The loan ultimately went into default, and Inland sued Petitioner and the other co-debtors (including ART) for the balance due, and sought to foreclose on the apartment complex in Indiana.

4. All of the parties to the case initiated by Inland, including Petitioner, *willingly consented to entry of the Judgment against them for $3.2 Million*.

5. ART negotiated a separate agreement with Inland that permitted a buyer, if one could be found, to purchase the Judgment from Inland for $3 Million, payable with $1.5 Million in cash and a $1.5 Million Note.

6. TacCo Financial, Inc., which was owned entirely by 2 separate and distinct companies, which in turn were owned entirely by 2 individuals, Wayne Starr and J.T. Tackett, found out that the Judgment was being offered at a reduced price, which included the rights to foreclose on, and acquire, the apartment complex in Indiana.

7. TacCo Financial was interested in acquiring the Judgment and the apartment complex in Indiana as it was in the business of buying distressed properties.

8. After TacCo Financial entered into negotiations with Inland to acquire the Judgment, Inland indicated that it would only transfer the Judgment to a single asset entity. Thus, the principals of TacCo Financial—Starr and Tackett, decided to incorporate a new entity, TacCo Falcon Point, Inc (Respondent in these proceedings).

9. Not a single party to the Consent Judgment entered in Indiana, including ART, are, or were ever, principals in TacCo Financial or TacCo Falcon Point. Similarly, neither Mr. Starr nor Mr. Tackett, or either of their companies, are principals, shareholders, or in any way affiliated with any of the debtors under the Consent Judgment, including ART.

10. Respondent ultimately concluded its negotiations with Inland to purchase the Judgment. As Respondent was a newly created entity, however, it borrowed the money from its parent, TacCo Financial, to make the initial $1.5 Million payment to Inland. TacCo Financial, in turn, borrowed the money from One Realco, another company that has no affiliation with ART.

11. Subsequent to Respondent's purchase of the Judgment, the apartment complex in Indiana

was sold at a judicially conducted foreclosure sale for $1 Million. Respondent acquired the property through a credit bid for $1 Million. Respondent was the only bidder at the foreclosure sale. Petitioner, despite having received notice of the sale, did not appear and did not bid on the property.

12. Respondent has never been paid a penny from Petitioner, or any other party, on the Judgment it acquired from Inland, although the Judgment has been reduced by the $1 Million bid on the property at the foreclosure sale, leaving a balance due, with interest, of more than $2.5 Million.[1]

Again, these facts are not being presented to this Court because they are material to the question of whether this Court should now grant the Petition before it. They are presented to demonstrate to this Court that Respondent does not accept Petitioner's rendition of the factual history of this dispute. In truth, the only relevant facts in determining whether to grant this Petition and review the decisions of the lower courts are that (i) Petitioner entered into a consent judgment in Indiana for $3.2 Million against him, (ii) Petitioner has never contested the validity or entry of the Judgment in Indiana, nor has he contested that the Judgment was properly domesticated in Michigan, and (iii) no responsible party under the

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[1] See Respondent's Response Brief in Opposition to Petitioner's Motion for Summary Disposition, pp. 4-5, and Respondent's Brief in Support of its Motion for Summary Disposition, Exhibits 1, 2, 3, 4 and 5 (Oak. Ct. Cir. Ct.)

Judgment, including Petitioner, has ever paid a dime toward satisfying it. The lower courts, when viewing these facts in conjunction with Michigan's enforcement proceedings, found that Respondent was entitled to summary disposition, and the right to immediately enforce and collect on the Judgment.

Finally, it is important to note that in this section of his brief, Petitioner once again attempts to mislead this Court with respect to the decision of the Trial Court, stating that "the Trial Court appeared to concede that if Indiana law applied, the judgment would be deemed satisfied". As stated earlier, this is entirely untrue. This time, however, Petitioner actually cites to the record to provide what he believes is support for this assertion. Yet, the quote Petitioner provides from the Trial Court's transcript provides no such support. Contrary to the repeated assertions of Petitioner, the Trial Court never found that Petitioner's strawman argument was valid, or meritorious, under Indiana law. Rather, the Trial Court merely stated that the strawman defense is *available* in Indiana, stating: "...the next question is whether the strawman defense can be raised in Michigan where it is not recognized here but is available in Indiana".[2]

Is it possible that Petitioner has truly interpreted this statement to mean that the Trial Court found that the Judgment would be satisfied if Indiana law applied? Of course not. Nobody could. Instead, Petitioner's reliance on this statement from the Trial

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[2] App. A, p. 14b.

Court as support for his claim that he would "prevail" under Indiana law, illustrates how desperate he has become to bolster his argument that the application of Michigan law to this proceeding has stripped him of an otherwise viable and meritorious defense to the enforcement of the Judgment. In reality, Petitioner's "strawman" defense fails under either jurisdiction, as was pointed in out in great detail to the lower courts.[3] Nevertheless, and in direct contradiction to the repeated representations of the Petitioner in his brief filed in this Court, no court has ever decided the merits of the "strawman" defense.

## SUMMARY OF THE ARGUMENT

Once again, as Petitioner has repeatedly done throughout these proceedings, he is attempting to frame the argument for this Court as if it were now being asked determine which state's defenses apply *to the Judgment itself.* Petitioner has stated in his brief that the question before this Court is whether the Full Faith and Credit Clause permits a state that has domesticated a foreign judgment to apply the substantive law of the state of rendition to defenses to the judgment. While Petitioner might prefer that this were actually the argument decided by the lower courts and now being presented to this Court, it is not. As Petitioner is fully aware, he has never attacked the validity of the Judgment or, for that matter, the Indiana state court's entry of the Judgment. How can

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[3] See Respondent's Response Brief in Opposition to Petitioner's Motion for Summary Disposition, and Respondent's Brief in Support of its Motion for Summary Disposition (Oak. Ct. Cir. Ct.).

he...he consented to the Judgment. Rather, he has simply claimed, time and time again, that the Judgment cannot be *enforced* against him because, *after its entry*, it was satisfied under Indiana law in accordance with his "strawman" theory. This argument is not a defense to the Judgment itself. Rather, as the Trial Court and Michigan Court of Appeals found, this argument is simply a defense to the "enforcement" of the Judgment, and therefore subject to Michigan law.

In short, Petitioner consented to the Judgment in Indiana. This fact is not in dispute. In addition, Petitioner has never alleged that the Judgment is somehow invalid, or that it was entered in error by the state court in Indiana. This fact is also not in dispute. Moreover, Petitioner has never appealed the decision of the Trial Court (which was made prior to the entry of the summary disposition order Petitioner now challenges) domesticating the Judgment and recognizing it—or giving it *full faith and credit*—in Michigan. Instead, Petitioner, at all times, has simply challenged Respondent's right to enforce—or collect on—the Judgment, based on post-judgment activity he alleges occurred. Thus, the defenses he has raised throughout these proceedings are defenses to enforcement, not defenses to the Judgment itself. As such, these defenses are unequivocally governed by the law of the domesticating state...in this case Michigan.

This point is critically important in order to fully understand what Petitioner is asking this Court to consider. This case is not, as Petitioner suggests, about whether the lower courts in Michigan adhered to the principles of the Full Faith and Credit Clause of

the United States Constitution. Clearly, the Michigan courts did adhere to these principles by domesticating the Indiana Judgment and giving it "full faith and credit" in Michigan. Instead, this case is solely about whether the lower courts were correct in determining that this action was an enforcement proceeding, and therefore subject to Michigan law. In fact, Petitioner does not, and cannot, dispute that Michigan law applies to enforcement proceedings. Thus, Petitioner is left to dispute one, and only one, issue—whether Respondent's attempt to collect on a properly domesticated judgment is an enforcement proceeding. While Petitioner may disagree with the lower courts' determination of this question, this issue does not implicate the United States Constitution or federal law in any way, and Respondent respectfully submits that review by this Court is not warranted.

Finally, Respondent must point out that Petitioner has, once again in this section of his brief, intentionally misrepresented the procedural history of this matter, by stating that "the parties and the courts in Michigan in this case appear to agree that if Petitioner's arguments were judged by Indiana law, the state of rendition, the judgment would be satisfied." Not surprisingly, there is no citation to the record in support of this erroneous assertion. This is no accident. No citation exists to support this false and intentionally misleading statement.

Despite Petitioner's repeated representations to the contrary, the Trial Court never held that the Judgment would be deemed satisfied under Indiana law. Moreover, Respondent argued repeatedly in the lower courts that, even under Indiana law, Petitioner's

defenses to the enforcement of the Judgment still fail. Thus, there has never been either an acknowledgement that Petitioner's "strawman" defense is applicable under Indiana law, nor a decision, holding, or even a statement on the record by any lower court that the Judgment would be deemed satisfied under Indiana law.

In short, Petitioner has improperly framed the argument presented to the lower courts, and that is now being presented to this Court. He has also intentionally misrepresented both the position of the Respondent with respect to the application of Indiana law to his "strawman" theory, and the findings of the lower courts on this same issue. Most importantly, he has utterly failed to present any justification, much less a compelling justification, that would warrant granting the instant Petition and reviewing the proceedings and decisions of the Trial Court and Michigan Court of Appeals.

## ARGUMENT

In determining Respondent's right to enforce the Judgment in Michigan, both the Trial Court and the Court of Appeals relied on a wealth of case law and statutory law in reaching the same decision—this action is nothing more than an enforcement proceeding that is controlled by Michigan law, and since Michigan law does not, and never has, recognized the "strawman" theory espoused by Petitioner, the Judgment has not been satisfied and remains subject to collection by Respondent.

Petitioner's arguments before this Court are not new (although he now presents them as if they impact the continued validity of the Full Faith and Credit Clause of the United States Constitution). He argued to the Trial Court and the Court of Appeals, as he argues now, that Indiana law should apply to his "strawman" defense, because—according to Petitioner—issues of satisfaction of a validly entered judgment do not involve enforcement, but somehow involve substantive defenses to the judgment itself. As the Trial Court and Court of Appeals found, this argument is nonsense. Petitioner further argued in both lower courts, as he argues now, that under the Full Faith and Credit Clause, Michigan is required to apply Indiana law to his defenses, and that the Uniform Enforcement of Foreign Judgments Act does not apply in this instance based upon the circular reasoning that if his "strawman" defense were recognized, there would be no judgment to enforce (somewhat like the argument, what comes first—the chicken or the egg). Again, the lower courts rejected these arguments, and correctly determined that (i) this is an enforcement proceeding, (ii) Michigan law applies, and (iii) Michigan does not recognize the "strawman" defense.

In reaching its decision, the Trial Court relied upon the U.S. Supreme Court decisions in *Hampton v. M'Connell,* 16 U.S. (3 Wheat.) 234; 4 L. Ed. 378 (1818), and *Baker v. General Motors Corp.*, 522 U.S. 222, 235; 118 S. Ct. 657; 139 L. Ed. 2d 580 (1998), and concluded that "the strawman defense is not available to Defendant as it is not recognized in the state of

Michigan."[4] Similarly, based upon the language of the Uniform Enforcement of Foreign Judgments Act, as well as U.S. Supreme Court precedent governing the application of the Full Faith and Credit Clause, the Court of Appeals, noting that "Clapper is merely trying to avoid enforcement of the judgment based on actions that occurred after the valid entry of the judgment," held that Michigan law applied to these enforcement proceedings.[5] The Court of Appeals then rejected Petitioner's argument that Michigan recognizes the "strawman" defense, noting that "Clapper has not cited any binding or persuasive authority indicating that the strawman defense, whether referred to as such or referred to by another name, is recognized in Michigan."[6] In summary, the Court of Appeals concluded:

> Here, the judgment has *not* been discharged and there is certainly no satisfaction of judgment found in the record. Indeed, the consent judgment under which Clapper is liable remains in effect and TacCo is seeking to enforce it. (Emphasis in the original.)[7]

In his brief, Petitioner not only misconstrues the purpose of the Full Faith and Credit Clause (which is to give foreign judgments full faith and credit in all 50

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[4] App. A., p. 15b.

[5] *See* Appendix A to Petitioner's Brief, pp. 7a-8a.

[6] *See id.* at p. 8a.

[7] *See id.* at p. 7a.

states...precisely what the Michigan courts have done here), as well as the authority interpreting this Clause, but he also completely ignores the application of relevant Michigan statutory law to this issue, specifically the Uniform Enforcement of Foreign Judgments Act, MCL 691.1171, et. seq. (the "Act"). The Act provides a mechanism for the enforcement of foreign judgments and was designed, in no small part, to create a level of consistency for the Courts and litigants. The Court of Appeals found that the Act not only applied to these proceedings, but that it was dispositive on the issue of whether Michigan law applies. Quoting directly from the Act, the Court of Appeals found that a foreign judgment filed under the Act has "the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of the circuit court, the district court, or a municipal court of this state **and may be enforced or satisfied in like manner.**" MCL 691.1173 (emphasis added). Thus, according to the Act, issues of satisfaction, like other enforcement issues, are controlled by Michigan law.

In the lower courts, Petitioner argued, unsuccessfully, that the Act had no application to his defenses. Apparently, realizing that the language of the Act fully supports the application of Michigan law to his defenses, Petitioner changed his position and argued before the Michigan Supreme Court that the lower courts erred in even applying the Act to these proceedings, because Respondent elected to file an action to enforce its Judgment, as opposed to merely registering the Judgment under the Act. One can only assume that Petitioner realizes the absurdity of this

argument, as nowhere in his brief submitted to this Court is this argument even mentioned.[8]

There has never been an issue in this case regarding whether or not Michigan should give full faith and credit to the Indiana Consent Judgment; the Trial Court gave it full faith and credit by entering an order domesticating the Judgment. Instead, Petitioner argues that the Michigan courts have somehow misinterpreted the Full Faith and Credit Clause by refusing to apply Indiana law to the question of whether Respondent can now enforce and collect on the Judgment. Not only is Petitioner wrong on this issue, but, respectfully, this issue does not warrant review this Court.

Nevertheless, addressing this issue, this Court has always adhered to the principle (which is consistent with Michigan statutory law) that the forum state's law applies to the enforcement of the judgment, not the laws of the rendering state. In *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234; 4 L. Ed. 378 (1818), this Court confirmed that a judgment of a state court has the same credit, validity and effect, in every other

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[8] There is absolutely no justification or support for the position that foreign judgments duly domesticated through a suit filed in Michigan (which is precisely what occurred here) should be treated differently by the Courts of this state than foreign judgments that are merely registered with the clerk's office. If this argument were accepted, not only would the consistency of the treatment of foreign judgments be lost (and the purpose of the Act defeated), but litigants would now be able to choose for themselves the law that would apply to their proceedings simply by electing the means in which they domesticate their judgment in Michigan. The results would be disastrous.

court within the United States, which it had in the state where it was rendered. *Id.* at 235. However, this was not the last word on the Full Faith and Credit Clause. In *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 10 L. Ed. 177 (1839), this Court once again discussed the effects of the Full Faith and Credit Clause,

> If a judgment is conclusive in the state where it is pronounced, it is equally conclusive, everywhere, in the states of the Union. If re-examinable there, it is open to the same inquiries in every other state...It is, therefore, put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment beyond the jurisdiction declaring it to be a judgment, but a domestic judgment as to the merits of the claim, or subject matter of the suit.

*Id.* at 326. With respect to a state's ability to control defenses to remedies on the judgments of another state, this court held:

> ...there is no direct constitutional inhibition upon the states, nor any clause in the Constitution from which it can be plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits.

*Id.* at 328. More recently, and directly in line with this reasoning, this Court has held that "Full faith and credit...does not mean that States must adopt the practices of other States regarding the time, manner,

and mechanisms for enforcing judgments", but rather enforcement "measures remain subject to the even-handed control of the forum law." See *Baker v. General Motors Corp.*, 522 U.S. 222, 235; 118 S. Ct. 657; 139 L. Ed. 2d 580 (1998) (citing, *Restatement (Second) of Conflict of Laws* § 99 (1971).

This Court's focus on the "even-handed" enforcement of judgments is critical. To require states to apply the law of the rendering state for enforcement purposes would be to impose on the courts of each state the burden of attempting to apply differing enforcement standards within its own boundaries. The result would be that some judgments would be afforded greater status for purposes of enforcement than others, based solely on the location of where the judgment was rendered. This result would actually be contrary to the purpose of the Full Faith and Credit Clause, which was to create an environment where judgments were treated "equally", and where the law of the domestication—or forum—state governed as to the enforcement of the judgment.

In fact, while the Full Faith and Credit Clause prevents a state from altering the *merits of and substantive provisions of a sister-state's judgment*, the enforcing state (in this case Michigan) is entitled—and in fact encouraged—to apply its own law regarding enforcement in order to place all judgments on an equal footing within the state. Petitioner ignores these basic principles in attempting to make his Full Faith and Credit argument, in essence asking this Court to grant his Petition in order to consider an argument in

contravention of almost 200 years of American jurisprudence.[9]

As has been previously stated, but deserves mention again, the basic fallacy in Petitioner's argument is that he did not raise in the lower courts, and is not raising now, *defenses to the Judgment itself*. In other words, substantive provisions of the Indiana Consent Judgment are not being, and have never been, challenged. Moreover, the Judgment itself has never been challenged, nor has Petitioner challenged its entry by the state court in Indiana. As the Michigan Court of Appeals held, "the consent judgment is not being challenged here," but rather "Clapper is trying to avoid enforcement of the judgment."[10]

Further on this point, the Court of Appeals specifically addressed—and directly rejected—Clapper's often repeated argument that his defenses are not defenses to the "manner of enforcement" of the

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[9] Interestingly, Petitioner's dispute of the application of Michigan law and procedure to the enforcement of the Judgment is contrary to the very procedural authority he relied on in the Trial Court to challenge the Judgment. In his motion for summary disposition in the Trial Court, Petitioner relied on MCR 2.612 (C)(1)(e), as authority necessary for the Trial Court to relieve a party from final judgment on the grounds that "the judgment has been satisfied, released or discharged...." (Petitioner's Brief in Support of His Motion for Summary Disposition, p.8). His fatal error then, which has created his predicament now, was his failure to recognize that his argument as to why the Judgment is satisfied is based entirely on a defense *arguably* recognized by the courts in Indiana, but not by a single court in Michigan.

[10] *See* App. A to Petitioner's Brief, p. 8a

Judgment, but rather to the "viability" of the Judgment. As stated by the Court of Appeals, Clapper's argument "elevates form over substance" because "[c]learly TacCo is seeking to enforce the judgment against Clapper, and Clapper is resisting enforcement by raising various arguments, including the strawman argument."[11] The bottom line: no matter how creatively the Petitioner tries to frame his position, or how passionately he attempts to persuade this Court that the Full Faith and Credit Clause of the United States Constitution is in jeopardy if the lower courts' decision is permitted to stand, there is no "federal" controversy here, and no question of law or constitutional interpretation worthy of review by this Court. Quite simply, as this Court itself has held, Michigan has the right to apply an even-handed approach to the enforcement of judgments within its jurisdiction, subjecting all judgments, whether decided by the courts in Michigan or by the courts of another state, to the same rules governing enforcement and satisfaction. *M'Elmoyle v. Cohen*, *supra*.

Finally, Petitioner argues that under the *Restatement (Second) of Conflict of Laws* §§ 115 and 116 (1971), Indiana law should be applied to these enforcement proceedings, and his "strawman" theory considered. Quoting from Section 115 and 116 of the *Restatement*, Petitioner argues that Indiana law should be applied to determine whether equitable relief can be obtained against the Judgment, and that Respondent cannot obtain relief in Michigan that is

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[11] *See id.* at p. 7a.

greater than the relief that could be obtained in Indiana.

Once again, these Sections of the *Restatement* do not apply to the facts of this case, or to a determination of the issues now presented. First, as the Court of Appeals noted, "Clapper has cited no basis for obtaining equitable relief against the judgment, which was a validly signed and entered consent judgment."[12] Thus, there is no legal or factual basis to support Petitioner's theory that he is seeking equitable relief on the Judgment. Second, Respondent has never attempted to obtain relief greater than the relief consented to by Petitioner in the Judgment itself. In reality, it is Petitioner that is seeking to modify the terms and effectiveness of the Judgment by claiming it has been satisfied under Indiana law as a result of post-judgment activity.

As for the Judgment itself, it is undisputed that Petitioner has never paid a penny toward satisfying it. It is also undisputed that Respondent has never received a penny toward payment on the Judgment. Finally, it is undisputed that the Judgment has never been discharged under Indiana law, nor is there any other order finding that the Judgment has been satisfied. On this point, the Court of Appeals concluded:

> Here, the judgment has *not* been discharged and there is certainly no satisfaction of judgment found in the record. Indeed the consent

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[12] *See* App. A to Petitioner's Brief, p. 7a.

> judgment, under which Clapper is liable remains in effect, and TacCo is seeking to enforce it.[13]

Quite simply, there is no merit to a single argument raised by Petitioner.

In short, this action involves nothing more than the enforcement, under Michigan law, of a foreign judgment, duly recognized and domesticated against a Michigan resident. Under Michigan law, foreign judgments are to be enforced and satisfied as any other judgment entered by a Michigan Court.[14] Accordingly, the Trial Court—as affirmed by the Court of Appeals—was correct in applying Michigan law, and not looking to Indiana law, in determining what defenses were available to enforcement of the Judgment in Michigan.

Respondent respectfully submits that Petitioner has not only failed to provide a basis for reversal of the decision of the lower courts, but, perhaps more importantly, he has utterly failed to provide a single justification that would warrant this Court's review of this matter and a grant of the instant Petition.

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[13] *See id.*

[14] MCL 691.1173.

## CONCLUSION

For the foregoing reasons, Respondent, TacCo Falcon Point, Inc., respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

John Frederick Redwine
*Counsel of Record*
Redwine Law Firm
1800 Valley View Lane
Suite 120
Dallas TX 75234
972-484-7782

Steven R. Lefkofsky
Lefkofsky & Gorosh, PC
31500 Northwestern Hwy.
Suite 105
Farmington Hills, MI 48334
(248) 855-5508

*Counsel for Respondent*

# APPENDIX

## APPENDIX A

**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT FOR THE**
**COUNTY OF OAKLAND**

**Circuit Court Number 2002-042917-CZ**

**[Dated May 31, 2006]**

| | |
|---|---|
| TACCO FALCON POINT, INC., | ) |
| a Texas Corporation, | ) |
| Plaintiff, | ) |
| | ) |
| v | ) |
| | ) |
| DAVID M. CLAPPER, | ) |
| Defendant and | ) |
| Third Party Plaintiff. | ) |
| | ) |

BEFORE THE HONORABLE FRED M. MESTER,
CIRCUIT JUDGE
Pontiac, Michigan - Wednesday, May 31, 2006

APPEARANCES:

STEVEN R. LEFKOFSKY (P44101)
Attorney for Plaintiff
31500 Northwestern Hwy., #105
Farmington Hills, MI 48334
(248) 855-5508

ANDREW W. MYCHALOWYCH
(P39602)
Attorney for Defendant/
Counter Plaintiff/
Third Party Plaintiff
37000 Grand River Ave, Ste 3500
Farmington Hills, MI 48335
(248) 442-0510

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ALSO PRESENT:

PETER A. JACKSON (P35528)
Attorney for Third Party
Defendants American Realty
Trust, Inc.
American Realty Investors Inc.
and Intervening Defendant
500 Woodward Ave., Ste 3500
Detroit, MI 48226
(313) 965-8300

Reported by:

Gwendolyn D. Finley, CSR-7127
(313) 525-8493

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WITNESSES: Plaintiff
None

WITNESSES: Defendant
None

EXHIBITS
None

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Pontiac, Michigan
May 31, 2006

THE CLERK: Calling Case Number 02-042917-CZ, *TacCo versus Clapper*.

THE COURT: Your appearances, please.

MR. MYCHALOWYCH: Andrew Mychalowych appearing on behalf of the Defendant/Counter Plaintiff/Third Party Plaintiff David Clapper.

MR. JACKSON: Peter Jackson for American Realty Trust and Investors.

MR. LEFKOFSKY: Steven Lefkofsky, your Honor, on behalf of the Plaintiff and Craig Davis from my office as well is here. So we're both present.

THE COURT: All right. Fine, thank you. Between this and the Froling matter I think we've got the entire bar.

Gentlemen, as you know my, or I should say our way of handling things is first we'll read all these several motions and then proceed to give you each an opportunity to articulate your respective positions. There

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are three basic motions. You can be seated, please.

Before the Court there's a Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) no genuine issue of material fact.

Defendant Clapper's Motion for Summary Disposition as to Plaintiff pursuant to (C) (9) a failure to state a valid defense and (C) (10) and Clapper's Motion for Summary Disposition to Clapper's claim against Third Party Defendants pursuant to (C) 9 and (10). That's filed in the alternative Defendant's Motion for Summary Disposition as to Plaintiff and that's to be heard if the Court denies the Defendant's Motion for Summary Disposition.

The Plaintiff filed this Complaint on August 7, 2002 to domesticate and enforce an Indiana Judgment, Consent Judgment, that is, for 3.2 million dollars in this state pursuant to the Full Faith and Credit clause of the United States Constitution. Plaintiff had been assigned the right to enforce it by Inland Mortgage Corporation.

Defendant Clapper filed a

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counterclaim against the Plaintiff alleging the following; Counts 1 through 4 are against ART Midwest LP and Count 5 allegedly seeks contribution from Third Party Defendants ARI, ART and ART Midwest for any amount that Clapper pays on the Indiana judgment. Judgment was entered on Counts 1 through 4 on November 18, 2002. The remaining issues in this case involve the resolution of the defenses asserted by Clapper. We have a date certain within two weeks of June 13, 2006, and that is a date certain.

First, I'll address the Plaintiff's Motion for Summary Disposition. They assert the Defendant has three defenses: One, that Plaintiff is a strawman for ART and that when Plaintiff got the judgment from Inland, it was satisfied and discharged; two, Plaintiff sold the property to itself for less than the true value resulting in a fraudulent conveyance and; three, the Plaintiff failed to sell the property in a commercially reasonable manner and cannot recover any deficiency.

First, the Plaintiff argues that the strawman defense has no foundation in

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Michigan law and the general rule in Michigan is that the intent of the parties governs when it comes to determining whether a judgment has been satisfied.

Further, the Plaintiff argues that the foreign cases on which Defendant relies are distinguishable from these facts and are based on principles of equity not present here. Plaintiff asserts that the facts of this case do not even support the strawman defense.

Plaintiff also contends that there is no basis for the fraudulent conveyance argument because Defendant consented to the Sheriff's sale in the Consent Judgment and because inadequacy of price cannot vitiate a foreclosure sale, and they refer me to *Chabut versus Chabut* case.

Lastly, Plaintiff argues that there are no facts to support the argument that the sale was not commercially reasonable.

Now, Defendants have responded by asserting that ART paid money directly to Inland to eliminate the liability of the primary obligor ART Country Squire and ART

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under the Judgment. Thus, Defendant claims that to the extent that the judgment is satisfied as to the primary obligor and ART as guarantor, it is satisfied as to Defendant, a co guarantor. We're talking about Clapper then. Defendant also notes that Plaintiff cannot abrogate Defendant's defenses just because the foreign judgment was domesticated in Michigan.

As to the strawman defense, Defendant argues that it is available in Indiana and is not eliminated just because Plaintiff filed this action to domesticate the

judgment in Michigan. However, Defendant asserts that the Full Faith and Credit allows Defendant to raise it in Michigan, referring the Court to *Hampton versus McConnel* case, and argues that the agreement between ART and Inland and the agreement between Plaintiff and Inland demonstrate that their intent was the payment to Inland would satisfy the judgment and there would be no deficiency. The Defendant reviews Plaintiff's analysis of the cases on which Defendant relies on pages 9 through 16 of the respective brief and notes

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that the cases support a finding that the judgment has been satisfied.

Finally, Defendant argues that there is evidence to support the defenses of fraudulent conveyance and that the sale was not commercially reasonable.

The Defendant Clapper's Motion for Summary Disposition is the Plaintiff argues, first argues that the Court can set aside the judgment pursuant to MCR 2.612 (C) (1) (e), as it has been satisfied because Plaintiff was a strawman for ART, and Defendant provides evidence from Wachovia Bank that ART paid 1.5 million directly to Inland on March 13, 2002. Defendant asserts that the negotiation of the transaction with Inland was orchestrated by ART with the intent to extinguish ART'S obligation as a judgment debtor and then asserts that there's no deficiency and Plaintiff is not entitled to recover any money from the Defendant and that in any

circumstance, the most that Plaintiff could collect is $500,000.00 based on payments made by ART.

Now, the Plaintiffs have responded

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in referring to the Defendant's factual misrepresentations. Plaintiff again makes the argument that the strawman defense is not recognized in Michigan.

Defendants reply by disputing the specific facts. Plaintiff claims that Clapper misrepresented any facts. Defendant argues that Plaintiffs admits that the judgment is satisfied as to Defendant with regard to the 1.5 million paid although Plaintiff states the satisfaction is as to Inland only. Defendant argues that to the extent that Inland cannot enforce the judgment against Clapper, neither can the Plaintiff.

Next, Defendant argues that Plaintiff cannot dispute that ART paid Inland directly and that Plaintiff provides no evidence of the loans between the parties to which it refers.

Now, Plaintiff's Motion for Summary Disposition and Defendant's Motion for Summary Disposition as to the Plaintiff. Now, that's what we've discussed. Now, I would ask you to punctuate, if you will, your respective positions on that and we'll take care of the

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other motions later on. Thank you.

You've basically set out your arguments in your briefs, have you not?

MR. MYCHALOWYCH: I have, your Honor. I would just like to point out one item.

I did file after the reply Brief, which was the last brief that was filed by Plaintiffs to our Summary Disposition, there was a statement in that reply brief which we did not have the opportunity to respond to. I did file a supplemental brief, although I was informed that the Court may not have reviewed that because it was filed after the reply brief, but I wanted to point out very briefly that as to the issue of the application of law that on Page 2 of TacCo's reply brief in support of this Motion for Summary Disposition, TacCo cites to the restatement second conflict of the laws 1971 for the proposition that enforcement that you cannot travel with the sister state judgment as preclusive.

Cited in that exhibit which is Exhibit 1 of TacCo's reply, if the Court would

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look to the end of that document it specifically says that if you look to not this topic, topic 3 as to enforcement, but you look to topic 4 with respect to defenses and then what I did is attached topic four, which starts, "The effect of these various defenses for the recognition or enforcement of a foreign judgment is discussed in topic four." That's at the bottom of Exhibit 1's reply brief.

At the top of four then, discusses defenses to recognition and enforcement and this is all in the context of the context of law. It says, "A judgment will not be enforced in other states if the judgment has been discharged or otherwise under the local law of the state of rendition." Here the state of rendition is the state of Indiana.

And then also it states that, "A judgment will not be recognized or enforced in other states if upon facts shown to the Court equitable relief could be obtained against the judgment in the state of renditia."

And the comments assess, "A judgment creditor will not be permitted to

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obtain greater relief than that to which is entitled under local law of the state where the judgment is rendered," again, Indiana.

Once the creditors receives the amount due under judgment for payment of money they can obtain no further monetary relief from any state.

The point, your Honor, is that what was stated in the TacCo's reply brief is look for this restatement of loss. This says that you don't go to the sister state or the state of renditia. The actual, if you continue to read, the balance of those states what it does say specifically is the method of enforcement is in the state where it's being enforced. That makes sense because -

THE COURT: (Interposing) As I said, it is indicated a judgment is recognized to the extent that it is given the same effect with respect to the parties. The subject matter of the action issued involved that it has in the state where it was rendered.

MR. MYCHALOWYCH: Exactly, your Honor. So what was cited as to enforcement makes sense because if they enforce it

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differently in Indiana than they enforce it in Michigan, then you can't get the Michigan Sheriff to learn Indiana law or something else. But that deals only with enforcement and not the defenses and the defenses in this case were available in Indiana. This motion for satisfaction of judgment was filed within a month of the entry of that judgment in February of 2002 and it's been pending. The fact that it's been removed or they chose to bring it here to Michigan doesn't eliminate those defenses.

Applying Indiana law then, it's specifically in the case on point is and also citing to, also picked up by *Lillie*. It says, the judgment was thus in fact brought by Daggert, and I'm citing from *Lillie*, quote, "one of the joint tort fees of judgment debtors is clearly operated as an entire discharge of satisfaction of judgment even although the purchase was essentially made by *Lillie* and the assignment taken in his name and that would keep the judgment alive as an obligation against dinor" (phonetic).

In *Tomkins* cited on Page 17 of my

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brief, "It's a rare scheme to keep the judgment alive but it has been paid once before to nonavail. The Judgment was then discharged and satisfied and not revitalized."

I think the law is clear with respect to what happens when a co guarantor, a co surety pays money, and in this case I didn't come up with any evidence other than the Wachovia documents that we didn't discover until this Court allowed us to finally give discovery in this case and we subpoenaed those documents and then they came up with their internal documents that showed not only did ARI wire this money directly to Inland to satisify the first 100,000 before TacCo even existed -

THE COURT: (Interposing) But that's all put out in your briefs.

MR. MYCHALOWSKY: It is, your Honor.

The last point I'll make then is there's a citation made that says that if a surety pays it doesn't extinguish the judgment. In this case there's a blurring of the distinction between the surety and the

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primary obligor. If the surety pays it can pursue the primary obligor on the claim of indeminification because it was the primary obligor's obligation. However, the surety pays, it extinguishes it as the co sureties and the judgment is satisfied. If the primary

obligor pays, and in this case the credit was given to our Country Squire as the primary obligor, then it satisfies the sureties because it was his responsibility in the first place.

THE COURT: Isn't that the argument you made in your brief, Counsel?

MR. MYCHALOWYCH: Thank you, your Honor.

THE COURT: You have a response?

MR. LEFKOFSKY: Just very briefly, your Honor. We're proceeding here in Michigan under a domesticated judgment. We're proceeding under the Court Rule that talks about their right to plead defenses as to judgments that would be applicable to judgments entered in Michigan. Michigan doesn't recognize the strawman argument, therefore, the defense is inapplicable. Even

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if it did, we've cited the laws as to why it's inapplicable and it's all in the brief.

THE COURT: Thank you. No one else has anything to say at this juncture. I think it's all in -- you know, this is much reading material we have, and as you know my staff attorney reads it, I read it, we read it thoroughly.

Let's address Plaintiff's Motion for Summary Disposition and Defendant's Motion for Summary Disposition as to Plaintiff.

The first issue is whether the Plaintiff can raise the defense that Plaintiff is merely a strawman for ART *and, thus, the judgment has been satisfied.*

The Court first addresses the issue of Defendant's affirmative defenses on April 9, 2003. At that time, the Court gave Full Faith and Credit to the Indiana judgment. It stated that Michigan courts have consistently held that, "A judgment entered by a court of competent jurisdiction is not subject to collateral attack against the underlying obligation." The Court found that although it could not relitigate issues

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related to the underlying judgment, it could address allegations and issues that arose subsequent to the Consent Judgment as part of the enforcement procedures. Thus, because Defendant's affirmative defenses arose out of actions that took place after the judgment was taken, Full Faith and Credit does not bar those defenses from being raised related to the enforcement in Michigan. However, the next question is whether the strawman defense can be raised in Michigan where it is not recognized here but is available in Indiana as a defense.

Defendant relies on a Michigan Supreme Court case, *Ward v Hunter*. That case held that Defendant could not use the defenses of set off and recoupment and could not counterclaim for fraud where he could not have done so in the state where the judgment was obtained and where the strawman defense could have been raised in Indiana. Thus, that case is factually

distinguishable from this one and does not apply to this case.

Further, the United States Supreme Court case on which Defendant relies *Hampton*

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*versus McConnell*, only states that the Full Faith and Credit requires that the judgment of a state court, which had jurisdiction of the parties and the subject matter be given the same validity in the courts of every other state and be equally conclusive upon the merits. Thus, it does not stand for the proposition that defenses valid in one state can be raised in another.

The law is also clear that, "Full Faith and Credit, however, does not mean that States must adopt the practices of other States regarding the time, manner and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law," that is this Court's law and that's the *Baker versus General Motors Corp* 522 US 222. Thus, the Court is satisfied that the strawman defense is not available to Defendant as it is not recognized in the state of Michigan.

The next question is whether Plaintiff sold the property in a commercially

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reasonable manner. Defendant relies on the fact that before the sale for one million, the property was valued

at $1.95 million by Integra a few months after the foreclosure sale, ART'S chairman entered into a purchase agreement for $3.4 million, creating an issue of fact. Plaintiff asserts that it was sold in accordance with Indiana law and Defendant received notice of it. Defendant cites MCL 600.3280, however, that involves "foreclosure by advertisement" and states that it does not apply foreclosure sales made pursuant to a court order, such as in this case. As evidence, Defendant relies on Ted Stokely's testimony that ART was aware that he was willing to pay $3.4 million, yet Plaintiff only bid $1 million. Defendant also relies on the appraisal by Integra a few months after the sale of at least $1.95 million.

In *Chabut versus Chabut*, the Court held that "inadequacy of the sale price is not sufficient, in and of itself, to compel the setting aside of a foreclosure sale." Further, Michael Lady of Integra testified that a property could sell for more than 25%

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less than the appraised value. Based on the evidence that has been submitted, this Court finds that the fact that a better price could have been obtained is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. Defendant has not provided any evidence that the appraisal a few months later establishes that the price was not reasonable in light of Mr. Lady's testimony about foreclosure sales. Defendant has not alleged that the sale was conducted improperly under Indiana law. Defendant's argument that the price was too low is based on speculation and conjecture. In addition,

Defendant has not provided any expert opinions that the sale was commercially unreasonable and the Court must conclude that Defendant has failed to demonstrate the existence of a genuine issue of material fact regarding whether the sale was conducted in a commercially unreasonable manner.

Lastly, this Court will address the question of whether Plaintiff sold the property to itself for less than the true value resulting in a fraudulent conveyance.

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This claim is based on Defendant's assertion that Plaintiff sold the property to itself for less than the fair market value as evidenced by the subsequent sale of $3.4 million.

In *BFP versus Resolution*, the United States Supreme Court held that with regard to a bankruptcy fraudulent transfer provision, "reasonably equivalent value" for foreclosed real property is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with and that . . . fair market value is not necessarily the benchmark against which determination of reasonably equivalent value is to be measured. The Court stated that "fair market value presumes market conditions that, by definition, do not obtain in the forced-sale context, since property sold within the time and manner strictures of state-prescribed foreclosure is simply worth less than property sold without such restrictions."

Although this case is not in the context of a bankruptcy, this Court finds that this reasoning is instructive in that in this

[p.23]

situation as well, the price at a foreclosure sale is likely to be worth less than property sold without the restrictions imposed by the foreclosure procedure. Thus, the Court finds that Defendant's affirmative defense of fraudulent conveyance must fail and Plaintiff's judgment must be enforced and therefore Defendant's Motion for Summary Disposition is denied and Plaintiff's Motion for Summary Disposition is granted. In light of the Court's ruling on the motions with regard to enforcement of the judgment, the Court will now address Defendant's Motion for Summary Disposition as to third party defendants.

Defendant Clapper's Motion for Summary Disposition as to Clapper's claims against the third party defendants states basically and argues that no fact issue exists as to Defendant's claim for contribution against third party defendants. Defendant notes that as a co obligor under the judgment sought to be enforced by Plaintiff, Defendant is entitled to a contribution from third party defendants. Defendant also seeks to

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immediately execute on judgment entered against third party defendants in favor of Defendant unless they deposit $1.2 million in the same account that Defendant deposited the money to stay execution by

Plaintiff or post proper security and that half be released to Defendant.

Third party defendants have responded by arguing that the third party complaint does not seek contribution from third party defendants in that Count V only seeks relief against ARI and ART, not ART Midwest. Further, third party defendants argue that ARI's answer states a valid defense that Defendant's motion does not overcome. Third party defendant argues that Defendant's motion is really a disguised request for declaratory judgment. Third party defendant notes that Defendant admits that he is not yet entitled to a money judgment.

Next, the third party defendant contends that Defendant fails to establish facts to support his contention that ART is responsible to contribute half of the total liability.

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Now, Defendants have replied by noting that because he is not seeking Summary Disposition as to ART Midwest but only as to ART and ARI, Third Party Defendant's argument is moot. Defendant asserts that ART and ARI are the same for all relevant purposes and claims that he is entitled to a judgment for contribution based on the fact that he has had to deposit over $2.5 million in cash with the court. At a minimum, Defendant claims he is entitled to a judgment on liability.

Finally, Defendant contends that as a co guarantor, Defendant is entitled to 50% contribution from the other co guarantor on the judgment, ART.

Anything you wish to argue on this?

MR. MYCHALOWYCH: Briefly, your Honor. The argument that you look at just of judgment in order to determine between the Defendants what the contribution is, it doesn't take into consideration -- I've cited cases that show you to look at the kind of judgment itself in relationship to the parties. You have three primary obligors, those being ART, Country Squire and Inland.

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Those are primary obligors. If you only look at perhaps our Country Squire, our Country Squire paid the judgment which is was obligated to do as a primary obligor all along. It couldn't then seek contribution among the remaining parties because it had that obligation. You look at where the relationship of the parties are. There are two guarantors and there is no dispute that there are two guarantors. It's 50/50 between them. They can then seek indemnification from the parties below, which hasn't -- those claims haven't been brought here, but between the post sureties it's 50/50 and there hasn't been any -

THE COURT: (Interposing) So you're asking for summary disposition as to ART ?

MR. MYCHALOWYCH: Yes, as 50 percent of any amount the Court determines that Mr. Clapper is responsible for.

THE COURT: Thank you. Let me hear from ART.

MR. JACKSON: Your Honor, as far as the percentage issue goes it would be one

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thing if the Inland had sued on these guarantees and it recovered a judgment on the guarantees.

THE COURT: You agree that co obligors can be liable to each other in contribution?

MR. JACKSON: Yes. And the issue we have is in the percentage here. The debt on which the contribution is sought was reduced to a judgment. Whatever obligation those Defendants had were merged into that judgment as to which there are five Defendants and I would therefore say that the pro rata portion which is what the law requires is one fifth.

Secondly, your Honor, I'm concerned here that Mr. Clapper may get out in front of the process if a money judgment is given to him against ART before Mr. Clapper has actually satisfied his obligation to the Plaintiff. I don't have any problem once that it's clear that once that money is paid by Mr. Clapper, or I should say once the Plaintiff receives the money that's on deposit with the Court that Mr. Clapper would have a

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contribution claim against ART, but Mr. Clapper is very likely to appeal this, to appeal the Court's ruling.

THE COURT: My ruling?

MR. JACKSON: And I just want to make sure we don't have a situation where my client is out, where Mr. Clapper is out, executing a judgment against my client while the principal case is still on appeal or still being -- or it is still at issue. Thank you, your Honor.

THE COURT: Thank you. Nothing further? I think you both said everything.

This Court has ruled that Plaintiff is entitled to a money judgment and the right to enforce it. I now will address the contribution claim;

Defendant's Amended Third Party Complaint seeks contribution from ART and ARI only based on the allegation that ART and its successor ARI, as co guarantors on the Inland note, caused the partnership, that's ART Midwest, to default on the Inland note. Defendant does not seek contribution from ART Midwest.

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Thus, the first issue that the Court must address is whether ARI is the successor to ART by merger, as alleged by Defendant in Paragraph 72 of the Third Party Complaint. Third Party Defendant denies that allegation. Although Defendant states numerous times

in its pleadings and argument that ARI is the successor of ART, he provides no evidentiary support for that allegation and, thus, there is no basis for contribution as to ARI.

As to ART, Defendant asserts that the claim for a 50% contribution is based on the fact that ART was a co guarantor on the Inland note. ART contends that there were five Defendants listed on the Indiana judgment and, thus, ART's share would be no more than one fifth as has been argued here this morning. However, Defendant notes that he can only seek contribution from another co guarantor and that because only Defendant and ART were sureties and the others were all primary obligors, only ART is liable for contribution. There is no dispute that ART and Clapper were co guarantors. Thus, the

[p.30]

question is whether ART is liable for 50% or one fifth of the Judgment. The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against others to obtain from them payment of their respective shares, and that's *Calwell versus FOX* case.

Further, the law provides that "Where one of two or more sureties for the same obligation has paid more than his share of the debt, he is entitled to contribution from his co sureties to reimburse him for the excess paid over his share in order to equalize

common burden, but it is only where parties are bound to discharge a common obligation that they are treated as "co-sureties." That's *French versus Young*.

I'm satisfied, therefore, that Defendant's Motion for Summary Disposition is granted as to ART.

MR. MYCHALOWYCH: And they're

[p.31]

responsible then for 50% of the amount due?

THE COURT: They're responsible for 50 percent. Thank you.

MR. LEFKOFSKY: Your Honor, just to clarify judgment granted to TacCo on all defenses and all claims that were brought, can we get an Order entered today? Would that be okay with you?

THE COURT: I agree.

MR. JACKSON: Your Honor, are we granting a money judgment that permits the Defendant to execute against my client before the client has done anything on -

THE COURT: (Interposing) I think it has to first be paid over to them, then he has to go against you. Thank you.

MR. MYCHALOWYCH: So a Judgment would be entered against ART for 50 percent of the amount?

MR. JACKSON: Subject to.

THE COURT: Subject to the payment of your amount to TacCo.

MR. MYCHALOWYCH: Now, if we choose to appeal and I haven't spoken to my client, if we choose to appeal the amounts

[p.32]

already posted would serve as a bond for purposes of appeal, the Court is then ordering that until that appeal is exhaustive that the Judgment with respect to ART would remain in abeyance?

THE COURT: As I understand it, first we have to take care of your obligation to TacCo. Your obligation to TacCo first, and then I would agree that ART has a 50 percent obligation under this obligation and, therefore, it has to pay you 50 percent of what you have to pay to TacCo. I think that explains it. I would ask that you enter an Order and not leave until that Order is executed by this Court and whatever your client desires to do in regard to the Judgment, I think we have to address it at that time.

MR. MYCHALOWYCH: Including, your Honor, in terms of whether or not the cash amount posted now would serve as a bond?

THE COURT: As bond. That's right. I'm not ready to address that at this time. Thank you.

(Proceedings concluded.)

{p.33}

STATE OF MICHIGAN )
COUNTY OF OAKLAND )

I, Gwendolyn D. Finley, Certified Reporter of the Sixth Judicial Circuit Court, State of Michigan, do hereby *certify that the foregoing pages 1-33 inclusive, comprise a true and correct transcript of the proceedings and testimony taken in the matter of TacCo Falcon Point, Inc., versus David M. Clapper, 2002-042917-CZ, on Wednesday, May 31, 2006.

/s/
Gwendolyn D. Finley, CSR-7127
11516 Nashville
Detroit, Michigan 48205
(313) 525-8493

August 18, 2006

*This is not a certified copy without an original signature.

(3)

Supreme Court, U.S.
FILED
OCT 10 2008
OFFICE OF THE CLERK

No. 08-273

# In the Supreme Court of the United States

DAVID M. CLAPPER,

*Petitioner*,

v.

TACCO FALCON POINT, INC.,

*Respondent*.

*On Petition for Writ of Certiorari to the Michigan Court of Appeals*

## PETITIONER'S REPLY BRIEF

ANDREW W. MYCHALOWYCH
*Counsel of Record*
LINDSAY JAMES
SICILIANO MYCHALOWYCH VAN DUSEN AND FEUL, PLC
37000 GRAND RIVER AVENUE
SUITE 350
FARMINGTON HILLS, MI 48335
(248) 442-0510

*Counsel for Petitioner*

October 10, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1.

Respondent, TacCo Falcon Pointe, Inc. ("TacCo"), states that Petitioner David M. Clapper ("Clapper"), has made a number of "factual misrepresentations." TacCo neglects to materially point *out* these alleged "misrepresentations," stating that because there are "so many," to do so would be "inefficient."[1] In this way, it is difficult to substantively respond to TacCo's comment other than to say that Clapper stands by the factual statements made in the Petition. Unlike TacCo, Clapper supported factual statements with precise citations to the lower court record.

2.

Material to Clapper's presentation of a concrete federal question under the full faith and credit clause of the U.S. Constitution and federal statute requires the establishment of three points: (a) that Clapper's co-Judgment Defendant, American Realty Trust, Inc. ("ART"), paid Inland Mortgage Company ("Inland"), not TacCo; (b) that Indiana's common law regarding the strawman defense is what Clapper has represented it to be; and (c) that Michigan's common law regarding the strawman defense is what Clapper has represented it to be. The parties appear in agreement with respect to the third point; that Michigan's lower courts ruled that the strawman

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[1] *Compare* Sup. Ct. R. 15.2.

defense is not available in Michigan. In its Brief in Opposition, however, TacCo argues that Clapper cannot satisfy points (a) and (b).

**a.**

After the $3.2 million Judgment was entered against ART and Clapper in the Indiana state court, ART negotiated with Inland to "purchase" the Judgment from Inland, with ART designating the purchaser. TacCo has repeatedly argued throughout this litigation that TacCo or its parent, TacCo Financial, paid Inland. **Brief in Opposition, pp. 4-5.** As Clapper has repeatedly pointed out throughout this litigation, this is simply not true.

In **Appendix 1**, Clapper has attached documentary evidence that ART and/or ART's successor[2] paid Inland, paid the Judgment, and wired the money to Inland *from ART's bank account*.[3]

In **Appendix 2**, Clapper has attached a portion of the deposition of Inland's Senior Vice President, Francis Panico, who serviced the subject loan. Ms. Panico was asked who paid the money to Inland to

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[2] ART has since merged into American Realty Investors, Inc., *see* Petitioner's May 8, 2008 Brief in Support of Petitioner's Motion for Summary Disposition against TacCo, p. 7 & n.3, another entity owned or controlled in one way or another by Texas real estate tycoon, Gene Phillips, and his family's trust.

[3] **Appendix 1** (Exhibit K to Petitioner's May 8, 2008 Brief in Support of Petitioner's Motion for Summary Disposition against TacCo).

purchase the Judgment. She testified that *ART* paid the money and that the first $1.5 million ART paid served to pay down the indebtedness on the Judgment.[4]

As for evidence that TacCo allegedly borrowed money from TacCo Financial to pay Inland, **Brief in Opposition, p. 5**, Clapper served discovery on TacCo for evidence of these alleged intra-company loans. None was produced.[5] And with respect to the $1.5 million note TacCo contends it executed in favor of Inland, **Brief in Opposition, p. 4**, the note was guaranteed by ART.[6] Consider that: Judgment-Defendant ART guaranteed payment of Judgment-Plaintiff TacCo's debt to allow Judgment-Plaintiff TacCo to purchase Inland's creditor position over Judgment-Defendant ART.

The evidence establishes that ART paid Inland, not TacCo.

**b.**

Clapper believes the above facts (and those more fully developed in the Petition) support his strawman argument under Indiana law; i.e., that the Judgment has been paid because a co-judgment debtor or its

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[4] **Appendix 2, pp. 4a-5a** (Exhibit 14 to Petitioner's August 28, 2006 Brief on Appeal).

[5] Petitioner's May 8, 2008 Brief in Support of Petitioner's Motion for Summary Disposition against TacCo, p. 13.

[6] *Id.* at p. 13 & Ex. S.

"straw" (its sham, its alter ego) paid the Judgment to keep the judgment alive against another co-judgment debtor. This argument has venerable support in the common law of Indiana, the state that rendered the Judgment. At page 9 and note 24 of the Petition, Clapper cited this Court to a number of Indiana cases that support the strawman theory. For example, the Indiana Supreme Court has held:

> The payment of the judgment in favor of Green by one of the two joint debtors was an extinguishment, and, of course, this rendered it legally impossible to enforce it by the execution of a deed. Payment by one primarily liable as a judgment debtor extinguishes the judgment.[7]

This principle, that payment by a co-judgment debtor extinguishes the judgment, has been reaffirmed by the Indiana Court of Appeals at least twice.[8]

These principles were applied by the U.S. Court of Appeals for the Sixth Circuit (applying Indiana law) in *Lillie v. Dennert*. Clapper submits that *Lillie* is dead on point; and had the Michigan trial court below applied Indiana law, Clapper submits the Judgment would have been ruled satisfied.

In *Lillie*, Horrie obtained a judgment against Daggett and Dennert. Horrie subsequently assigned

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[7] *Klippel v. Shields*, 90 Ind. 81 (1883). *See also Zimmerman v. Gaumer*, 152 Ind. 552, 560-61 (1899).

[8] *See Lapworth v. Jones*, 133 Ind. App. 388, 392-93 (1962); *Carey v. Haddock*, 877 N.E.2d 842, 844 (Ind.App. 2007).

the judgment to Lillie in exchange for cash. Lillie sought to garnish and execute against Dennert's property. Dennert defended by arguing that "the money paid to Horrie was in reality the money of Daggett, the payment, as a matter of fact and law, the act of Daggett, and the action taken by Lillie a mere sham and pretense."[9] After an evidentiary hearing, the district judge was persuaded that the evidence supported Dennert's claim, and ordered that a judgment of satisfaction be entered.[10]

The Sixth Circuit affirmed. The Court found that there was evidence supporting the fact:

> that the judgment having been purchased with the proceeds of this note was, in substance and effect, bought by Daggett, acting by indirection, through the instrumentality of Lillie; in short, that Lillie acted in the entire transaction merely as a man of straw for and in behalf of Daggett, as the real actor.[11]

The Court further found that if:

> the judgment was thus in fact bought by Daggett, one of the joint tort feasors and judgment debtors, this clearly operated as an entire discharge and satisfaction of the judgment, even although the purchase was

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[9] *Lillie v. Dennert*, 232 F. 104, 105 (6th Cir. 1916).

[10] *See id.*

[11] *Id.* at 108.

> ostensibly made by Lillie and the assignment taken in his name in the effort to keep the judgment alive as an obligation against Dennert.[12]

That is what Clapper alleged that ART did through TacCo, and that is what the evidence has shown. Clapper's strawman argument therefore finds strong support in the common law of Indiana.

TacCo, however, disputes that it conceded that Indiana law provides for the strawman defense, and states that TacCo "disagrees" with the body of authority cited by Clapper. In TacCo's Brief in Opposition, however, no effort was made to distinguish the above authority. And no contrary authority was cited. Clapper construes this kind of silence as a de facto concession, particularly in light of the fact that the Michigan trial judge stated that "the strawman defense . . . is available in Indiana as a defense."[13] It would not be available in Indiana because the Michigan trial court said so; it is available because that is the rule published in Indiana cases like *Klippel*, *Lapworth*, and *Lille*. Therefore the material points (b) and (c) referenced at the beginning of this section have been established.[14]

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[12] *Id.* at 109.

[13] TacCo Brief in Opposition, **App. A**, p. 14b.

[14] Clapper's citation to the trial court record was not to establish that the trial judge applied Indiana law to the facts of this case in order to make some hypothetical ruling. The Michigan courts did not make such a ruling because, in applying Michigan law, they

The key issue raised in the Petition is whether the Michigan courts were right to hold that the full faith and credit clause required the Michigan trial judge to apply Michigan law to Clapper's defenses as opposed to Indiana law. Because the law on the strawman issue is different in Michigan than it is in Indiana, the decision to apply Michigan law was dispositive.

"The full faith and credit clause does not . . . protect a judgment . . . [that] has been paid."[15] Clapper's argument is that the relevant, preliminary inquiry, "the first step" using the phraseology of Justice Kennedy,[16] is what would Indiana do with these facts; not what would Michigan do. That is the essence of the federal question Clapper presented in his Petition. The above discussion demonstrates that the question is concrete, such that it gives this Court the opportunity to define the contours of full faith and credit when the rendition state says one thing regarding the continuing viability of a judgment, and the enforcing state says something completely different.

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held that no set of facts could *ever* satisfy the strawman defense, because it is simply not available under Michigan law. In this way, we agree with TacCo that no court has ever adjudicated Clapper's strawman defense on its merits.

[15] *Trauger v. A.J. Spagnol Lumber Co., Inc.*, 442 So.2d 182, 183 (Fla. 1983), *relying on Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 275 (1935).

[16] *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 247 (1998) (Kennedy, J., concurring).

3.

It is not until page 15 of TacCo's Brief in Opposition that TacCo first substantively addresses the federal issues raised in the Petition.[17]

a.

TacCo argues that the Michigan courts faithfully interpreted the full faith and credit clause when they applied Michigan law to Clapper's defenses as opposed to applying Indiana law. As support, TacCo primarily relies on authority cited by Michigan's lower courts, that being this Court's 1998 decision in *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222 (1998). At pages 16 and 17 of the Brief in Opposition, citing *Baker*, 522 U.S. at 235, TacCo states:

> "Full faith and credit . . . does not mean that States must adopt the practices of other States regarding time, manner, and mechanisms for enforcing judgments," but rather enforcement "measures remain subject to the even-handed control of the forum law."

The problem with TacCo's citation to this part of the *Baker* decision is that Michigan's application of its substantive law to Clapper's strawman defense has nothing to do with regulating: the *time* for enforcing the Judgment; the *manner* of enforcing the Judgment; or the *mechanism* for enforcing the Judgment.

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[17] This is after fifteen pages worth of swollen hyperbole and discourteous *ad hominem* attacks on Clapper counsel.

Clapper's defense has to do with *payment* and whether there is a Judgment to enforce. In the Petition, Clapper cited this Court's decision in *Hampton v. M'Connel*, 16 U.S. 234, 235 (1818), which held that "in every case arising under the act, the only inquiry is, what is the effect of the judgment in the state where it was rendered." The preliminary inquiry, therefore ("the first step") is what is the effect of the judgment in the court of rendition. Judge O'Connell, in his dissenting opinion in the Michigan Court of Appeals, summarized the issue articulately and makes the point better than we can:

> It is simply common sense to conclude that you cannot enforce a judgment that has been satisfied. In the present case, the trial court refused to conduct an evidentiary hearing to determine if the foreign judgment had been satisfied, and the majority opinion seems to allow plaintiff to collect on a judgment whether or not it has already been satisfied. . . . I concur with the majority that we apply Michigan law to *enforcement proceedings*. However, I note *that there is no enforcement proceeding if the judgment has been satisfied*.[18]

**b.**

At page 17 of the Brief in Opposition, TacCo argues that Clapper's full faith and credit argument would undermine the salutary goal of "uniformity," in that

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[18] Clapper's Petition, **App. A**, p. 19a & n.1 (O'Connell, J., Dissenting) (emphasis added).

"some judgments would be afforded greater status for purposes of enforcement than others." This is not accurate. For the reasons articulated above in *Hampton*, by Justice Kennedy in *Baker*, and by Judge O'Connell in the Michigan Court of Appeals, there is no enforcement of a judgment that has been satisfied. If a judgment has not been paid, then of course enforcement measures remain subject to the even-handed control of the forum. But the preliminary inquiry of whether the judgment is enforceable should be governed by the law of the state of rendition, not the law of the enforcement state. This would assure that all judgments would receive the same treatment regardless of where plaintiffs register their judgments.

Under TacCo's theory, however, even if Clapper obtained a satisfaction in Indiana based on his strawman defense (a motion is pending in Indiana state court on this issue), TacCo could nevertheless collect on the Judgment in Michigan. Or if TacCo registered the Judgment in, say, Florida, depending on how Florida would view these issues, the Judgment may or may not be enforceable. Clapper submits that TacCo's view would lead to chaotic results, affecting substantive rights for arbitrary reasons.

To the extent prudential values implicate the full faith and credit analysis, they support Clapper's interpretation, not TacCo's.

**c.**

At page 18 of the Brief in Opposition, TacCo argues that "the basic fallacy" of Clapper's argument is that Clapper is allegedly raising defenses to the Judgment

itself, something he did not do in the lower courts. Clapper is not arguing that the Judgment in Indiana is flawed, was entered fraudulently, or the like. His argument is that the Judgment has been paid. There is nothing untimely about raising this defense in a post-judgment proceeding; naturally, the defense of payment *always* arises in a post-judgment phase.

**d.**

At page 18 and note 9 of the Brief in Opposition, TacCo finds alleged analytical inconsistency with Clapper's use of *Michigan's* procedural rules to make his strawman arguments based in *Indiana* common law.

There is no inconsistency. As argued in the Petition, and consistent with the Second Restatement of the Conflict of Laws, the procedural vehicles to test substantive defenses are those provided by the forum law, while the legal standards applicable to the substantive defenses are provided by the law of the state of rendition.[19] The same concept finds support in other areas of the law, like when states make substantive choice of law decisions, or when federal courts apply the *Erie* doctrine. The forum state always applies its procedural law.

**e.**

At pages 19 and 20 of the Brief in Opposition, TacCo argues that Clapper's citation to Section 115 of

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[19] Clapper Petition, p. 12.

the Second Restatement of the Conflicts of Law is inapplicable because Clapper's arguments allegedly bring no material equities into play.

Clapper cited Section 115 as authority for the Academy's position that when a post-judgment defendant seeks certain relief from a judgment, the enforcing state should look to the law of the state rendering the judgment to determine if such relief is available (although the enforcing state should apply its procedural law in testing the defense). The purpose of citation to Section 115 was not to illustrate that there are equities that necessarily preclude enforcement of the Judgment. The broader point was to advise this Court that the Academy's position is that courts should look to the rendering state's law to test defenses to the Judgment. And if an enforcing state looks to the rendering state's law to test *equitable* defenses, why, then, would an enforcing state not look to the rendering state's law for purposes of *payment* defenses?

Clapper also cited to Section 116 of the Restatement, its comments, and illustrations (cited in the Petition), which are not tied to equities. These authorities support Clapper's belief that in order to determine if payment has been made, the enforcing state should look to the law of the state rendering the judgment.

In most cases, of course, the issue of whether a judgment has been paid is not a difficult one. But this is one of those cases where two states analyze the issues raised in this case very differently. The Court can probably come up with a number of other

situations where two states may have very different laws relating to a post-judgment defense to judgment, and where the continued viability of a judgment is in serious issue. In this way, certiorarai in this case could cover a lot of ground in an area of the law that could probably use greater and more in depth exposition. And for that, Clapper seeks the writ of certiorari.

f.

At page 20 of the Brief in Opposition, TacCo argues that Clapper "has never paid a penny towards satisfying [the Judgment]." The statement is astounding in light of the fact that TacCo produced no evidence in the lower courts that TacCo ever paid "a penny" *for* the Judgment. As demonstrated, ART paid for it. And as demonstrated *supra* and in the lower courts, there is no evidence that TacCo borrowed any money to pay Inland. Moreover, ART guaranteed TacCo's payment of the $1.5 million note made in favor of Inland.[20] With this arrangement in mind, it should come as no surprise that in six-plus years, TacCo has never sought to enforce the Judgment against ART.

## CONCLUSION

For the foregoing reasons and for the reasons articulated in his Petition, Petitioner respectfully

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[20] Inland would not have accepted TacCo's $1.5 million note (TacCo being a single purpose entity in existence for a matter of days) without ART's guaranty of payment of the note (ART being a multi-million dollar, publicly-traded company with real estate holdings all over the country).

requests that the Court grant his Petition, and issue a writ of certiorari to the Michigan Court of Appeals.

Respectfully submitted,

SICILIANO MYCHALOWYCH
VAN DUSEN AND FEUL, PLC

By: Andrew W. Mychalowych
Counsel of Record
Lindsay Kennedy James
37000 Grand River Avenue,
Suite 350
Farmington Hills, MI 48335
248.442.0510

Attorneys for Petitioner
David M. Clapper

# APPENDIX

# APPENDIX 1

## WIRE TRANSFER BUSINESS RECORDS, FORMS, AND PAYMENT ADVICE

*[Fold-out exhibit, see next six pages]*

SOUTHTRUST BANK OF ALABAMA — ÔReportIdÊ Run 13-MAR-2002 17:44 Page 2971
FULL TRANSACTION REPORT — For 13-MAR-2002

<<< TRN: 020313-001508 >>>

**** MESSAGE ENVELOPE **** ( Bank : SBA )

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TEST:538338 VAL:// TYP:FTR/1000 FMS:S CHG:DB:Y CD:Y COM:N CBL:N

---

IBT D/68189797/
AMER RLTY INVESTORS INC
1800 VALLEY VIEW LN STE 300
DALLAS TX 75234
SEND:S/COMLREAL
COMMERCIAL REAL ESTATE DEPT
DONT MAIL
DONT MAIL

CDT *A/071000770 ADV:FED
AMER NATL CHGO
AMERICAN NATIONAL BANK
CHICAGO, IL
BNF:/5330257875 CHG: BOTH
INLAND MORTGAGE CORP OPERATING ACCT

ORIG TO BNF INFO:
REF AMER RLTY INVESTORS LNB1218

**** CREDIT PAYMENT MESSAGE TEXT ****

{1510} Type/Subtype Code:
Type Code: 10 (Transfer of funds)
Subtype Code: 00 (Regular transfer)

{2000} Amount: $1,477,072.50

{3100} Sending Bank:
ABA number: 062000080
Short name SOUTHTRUST BNK
ABA lookup: Address not on file

{3320} Sender Reference 020313001508

{3400} Receiving Bank:
ABA number: 071000770
Short name: AMER NATL CHGO
ABA lookup Address not on file

{3600} Business Function Code: CTR (Customer transfer)

{4200} Beneficiary: D/5330257875
INLAND MORTGAGE CORP OPERATING ACCT

{5000} Originator: D/68189797
AMER RLTY INVESTORS INC
1800 VALLEY VIEW LN STE 300
DALLAS TX 75234

{6000} Originator to Beneficiary Info REF AMER RLTY INVESTORS LNB1218

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SOUTHTRUST BANK OF ALABAMA                  ÕReportIdÊ Run 13-MAR-2002 17:44 Page  2994
FULL TRANSACTION REPORT                                 For 13-MAR-2002

<<< TRN: 020313-001519 >>>

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-------------------------------------------------------------------------------
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AMER RLTY INVESTORS INC                  HBA OPERATING
1800 VALLEY VIEW LN STE 300              1800 VALLEY VIEW LN STE 300
DALLAS TX 75234                          DALLAS TX 75234
SEND:B/COMLREAL
COMMERCIAL REAL ESTATE DEPT
DONT MAIL
DONT MAIL


    **** MESSAGE TEXT ****


    MESSAGE HISTORY SEQUENCE
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        *DDA_INQ_CDT        INQ_CDT  AMOUNT: 250000.00
        *DBT_AUT
        CALLBACKQ       DEQ OPRID: SBALCH
        Memo: Ran: BYAUT
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        *SYS_MEMO           Message checked by STOP filter - 13-MAR-2002 11:40.
47.83
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code: 10
        *SYS_MEMO           Message from IBM host: code: 10, OVERDRAFT ERROR
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        *SYS_MEMO           POTENTIAL OVERDRAFT IMPACT -213,935.66
        *SYS_MEMO           Ran: AC-CD
        RISK_Q          DEQ CATEGORY: REVIEW   AMOUNT: 250000.00
        Memo: Ran: AC-CD
        RISK_LOG            OPRID: SBACDM  TIME: 13-MAR-2002 11:41:49.85
        Memo: SBA-CDM - INTERNAL
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001519; Routed.
        DDA_AUTQ        DEQ TEXT: 020313001519AMOUNT: 250000.00
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        DDA_POST_01         SEQ #: 1120 13-MAR-2002 11:41:52.61 Info: PD
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<<< TRN: 020313-001518 >>>

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---

DBT D/68189797/ CDT D/69980454/ ADV:LTR
AMER REIT INVESTORS INC TACCO FINANCIAL INC
1800 VALLEY VIEW LN STE 300 1800 VALLEY VIEW LN
DALLAS TX 75234 SUITE 300
SEND:B/COMLREAL DALLAS, TX 75234
COMMERCIAL REAL ESTATE DEPT
DONT MAIL
DONT MAIL

**** MESSAGE TEXT ****

MESSAGE HISTORY SEQUENCE

SBA is the owning bank. Priority: Delivery ACK:
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*SYS_MEMO Message checked by STOP filter - 13-MAR-2002 11:39:20.96
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*DDA_INQ_CDT INQ_CDT AMOUNT: 5000.00
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DDA_PDM_01 SEQ #: 1094 13-MAR-2002 11:39:21.03 Info: PD
*DDA RAM_DBT AMOUNT: 5000.00
DDA_POST_01 SEQ #: 1094 13-MAR-2002 11:39:22.31 Info: PD
Memo: DR posted with tran cd: 020313001518
DDA_PDM_01 SEQ #: 1095 13-MAR-2002 11:39:22.32 Info: PC
DDA_POST_01 SEQ #: 1095 13-MAR-2002 11:39:23.67 Info: PC
Memo: CR posted with tran cd: 020313001518
PAYADVQ DEQ TEXT: 020313001518AMOUNT: 5000.00
PAYADV_LOG OPRID: $$$PAY TIME: 13-MAR-2002 11:39:23.76
SYSPRFBAL PRF_DDA_DBT AMOUNT: 5000.00
*DDA RAM_CDT AMOUNT: 5000.00
SYSPRFBAL PRF_DDA_CDT AMOUNT: 5000.00
DDA_BACKEND ENQ TEXT: 020313001518

H

SOUTHTRUST BANK
P. O. BOX 2554
BIRMINGHAM, AL 35290
TELEPHONE 205-254-4000
DEAF/HOH 205-667-4154 TT/TTY
PAGE 8 STATEMENT DATE 03/31/02
ITEMS ENCLOSED 0
---- 58-189-787 ----

---- AMER RLTY INVESTORS INC CY 01

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DETAILED ACCOUNT TRANSACTIONS

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OTHER DEBITS

| DATE POSTED | AMOUNT | DESCRIPTION |
|---|---|---|
| | | 020311001536 |
| 03/11 | 440,000.00 | OUTGOING WIRE TRANSFER |
| | | 020311001511 |
| 03/11 | 387,001.74 | TRANSFER TO 0061304963 |
| 03/11 | 300,000.00 | OUTGOING WIRE TRANSFER |
| | | 020311001506 |
| 03/11 | 130,000.00 | OUTGOING WIRE TRANSFER |
| | | 020311001509 |
| 03/11 | 70,000.00 | OUTGOING WIRE TRANSFER |
| | | 020311001519 |
| 03/11 | 690.91 | TRANSFER TO 0061305359 |
| 03/12 | 832,498.68 | TRANSFER TO 0061304963 |
| 03/12 | 470,000.00 | OUTGOING WIRE TRANSFER |
| | | 020312002466 |
| 03/12 | 24,491.85 | TRANSFER TO 0061305359 |
| 03/13 | 1,477,072.50 | OUTGOING WIRE TRANSFER |
| | | 020313001506 |
| 03/13 | 615,356.07 | TRANSFER TO 0061304963 |
| 03/13 | 250,000.00 | OUTGOING WIRE TRANSFER |
| | | 020313001519 |
| 03/13 | 45,738.80 | OUTGOING WIRE TRANSFER |
| | | 020313001521 |
| 03/13 | 5,000.00 | OUTGOING WIRE TRANSFER |
| | | 020313001518 |
| 03/13 | 3,501.33 | TRANSFER TO 0061305359 |
| 03/14 | 600,000.00 | OUTGOING WIRE TRANSFER |

Control #

PAYEE:

PAYOR: ARI (Legal Name of Entity)

Sending Bank: South Trust

Account Name: ARI OPER

Account Number: 68 189 797

General Ledger Account:

Confidential - Subject to Protective Order 000129

$100,000.00

| ACCOUNTING UNIT | ACCOUNTING NUMBER | AMOUNT | DESCRIPTION | DUE DATE |
|---|---|---|---|---|
| 922 X0001 | 142920-7386 | $ 100,000.00 | | |
| 7386 X0001 | 168920-7386 | ($ 100,000.00) | | |
| X7899 | 120900-11 | $ 100,000.00 | | |
| | | | | |
| | | | | |
| | | VOUCHER TOTAL | | |
| | | $ 100,000.00 | | |

PRIORITY PAY:

#24

WIRE INSTRUCTIONS

Name & Address of Receiving Bank: American National Bank, Chicago IL

ABA # 071 000 770

Bank Account Name: Inland Mortgage Corp - Operating Acct

Bank Account Number: 5330257875

ATTENTION: Loan #1218

SPECIAL INSTRUCTIONS:

_____ Urgent

_____ Notify Upon Transmission

_____ Arrange Funds & Notify Prior to Transmission

White

Yellow

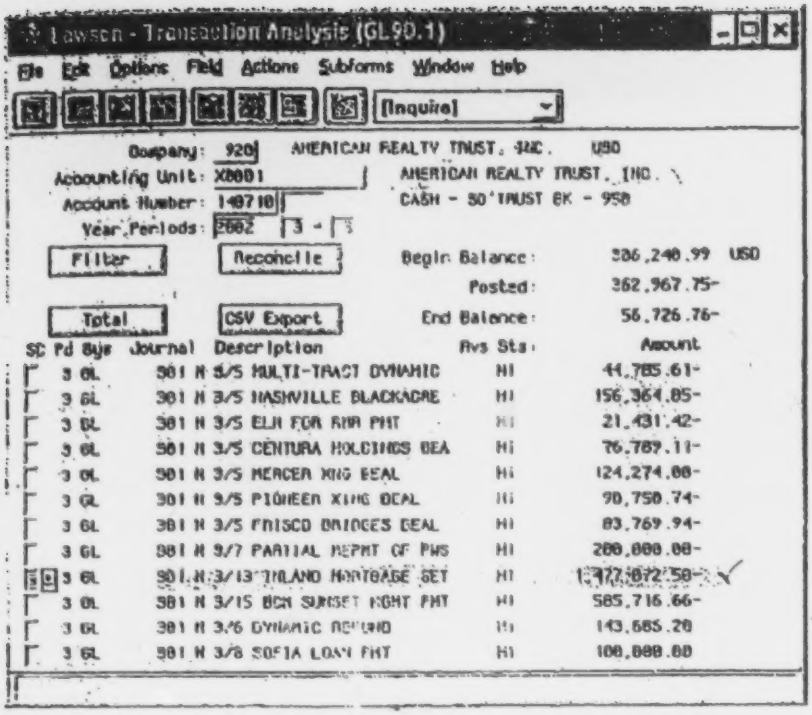
Pink

REQUESTED BY: [signature] DATE: 03.01.02

APPROVED BY: [signature] DATE:

EXECUTED BY: DATE:

BEST AVAILABLE COPY




#26

Confidential - Subject to Protective Order

## APPENDIX 2

## EXCERPT FROM THE DEPOSITION OF FRANCIS C. PANICO OAKLAND COUNTY

## [HEARING HELD MARCH 16, 2006]

* * *

[p. 30]

A. Yes.

Q. Whose handwriting is that?

A. Mine.

Q. It's dated February 11, 2002. Why did you prepare this document? Is this, again –

A. Well –

Q. I'm sorry. – a combination of your notes –

A. Yes.

Q. – discussion as well as your comments?

A. Yes. These were just notes that I took at a conversation that was going on.

Q. Okay. The second line from the top or second, I guess, the sentence from the top says "Arnett helped convince the judge that the trial should not be continued since the outcome of the Texas trail would have little or no difference on this trial."

Do – do you recall writing that, what the purpose was?

A. Well, that's my handwriting, so I definitely wrote it. I don't recall why I wrote it.

Q. All right. Were you aware that it was a Texas trial pending between ART and Mr. Clapper at the time; that is, it was

[p.31]

proceeding to trial very shortly after this?

A. I remember it now because you have refreshed my memory.

Q. Okay. Mr. Arnett was going to convince the Indiana judge that the trial on this case, the Inland case, shouldn't – or shouldn't be continued or stayed until the federal case was tried first?

A. I don't remember any of the details.

Q. Okay. There was a concern that it would be – it would not proceed, and ART wanted it to

proceed; that is, the Indiana matter as part of this?

A. I don't remember.

MR. LEFKOFSKY: Are you asking her that?

MR. MYCHLOWYCH: I'm asking if that's the case.

THE WITNESS: I don't remember.

BY MR. MYCHALOWYCH:

Q. All right. Let's go to the next grouping. There some looks like dash marks, and then some points being made. Well – so that question's about that.

In that second grouping, it says, "If the judgment ever comes back into our hands."

[p.32]

Who is "our"? Inland's?

A. Inland's.

Q. " . . . ART gets credit for one million five."

Is that one million – I'm sorry. It says 1.5 dollars. That's the million five in cash that was paid?

A. Yes.

Q. All right. So that was your understanding that if Inland ever – the judgment – there was a default and the judgment ever came, ART would get the credit against the judgment for the million five?

A. Yes.

Q. That's because they paid it?

A. Yes.

MR. LEFKOFSKY: Objection. Let's not put words in her mouth because at some point we can get to who actually paid the 1.5 million.

MR. MYCHALOWYCH: Oh, I think we know –

MR. LEFKOFSKY: We can do that if you want because otherwise you're just testifying for her at this point.

BY MR. MYCHALOWYCH:

[p.33]

Q. Let me – I disagree.

Let's look at exhibit – or what's been Bates stamped exhibit – as part of Exhibit A 0776 and 0777.

(WHEREUPON Bates Nos. 0776 - 0777 were tendered to the witness)

BY MR. MYCHALOWYCH:

Q. Actually, I can probably skip to 007 – 0776 and go directly to 0777. Do you see that?

A. Yes.

Q. All right. There is – appears to be a Form 10-Q from the Securities and Exchange Commission, Quarterly Report, and there's a notation. It says, "Ann Marie, these are financials on the new entity that will be purchasing the judgment on County Squire ARI."

And then there's a – it looks like initials F.C.P. Are those your initials?

A. Yes.

Q. And is that your notation?

A. Yes.

Q. All right. The financials that are being provided in this are for American Realty

* * *